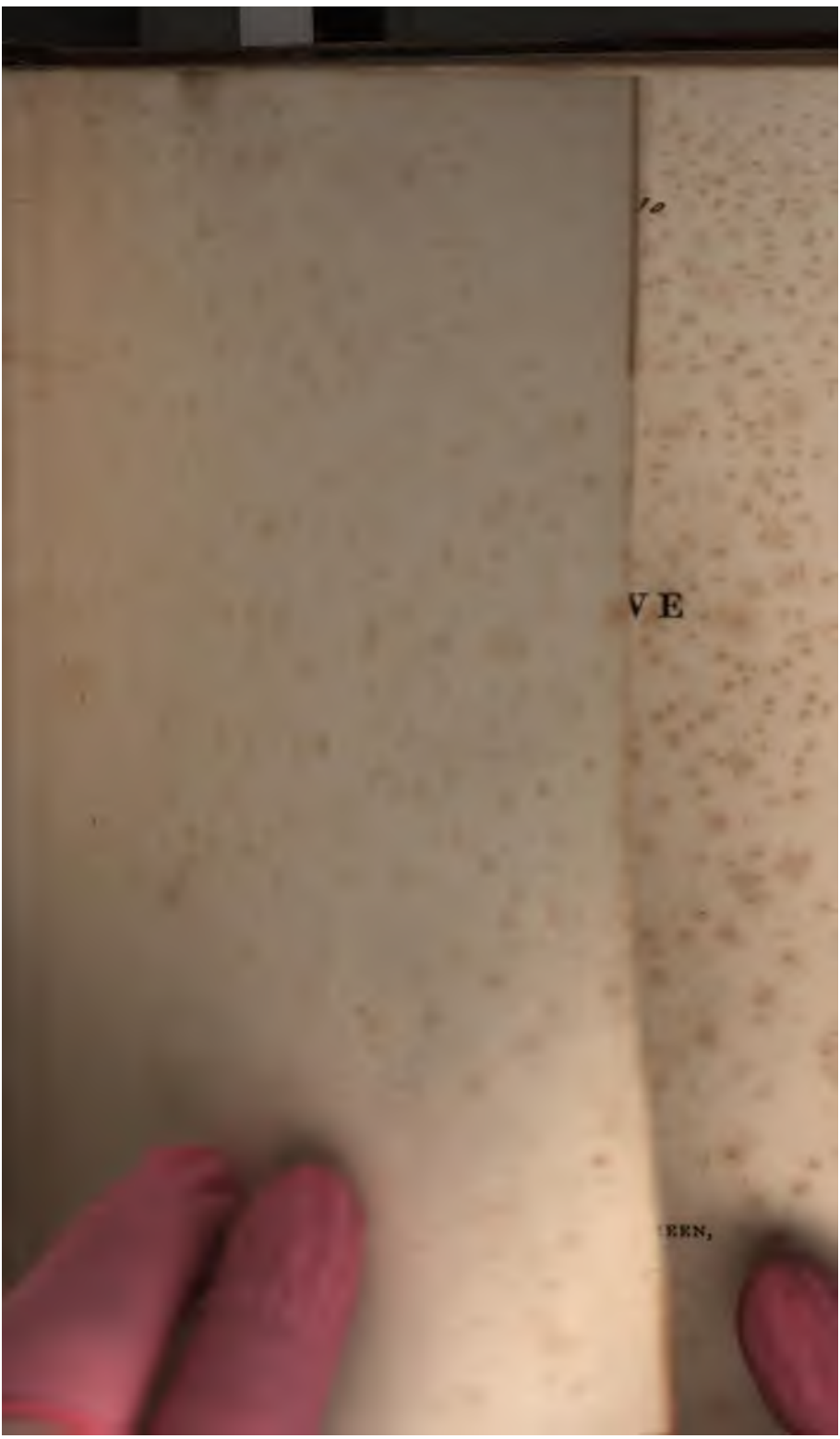

INQUIRY

INTO THE

RISE AND GROWTH

OF THE

ROYAL PREROGATIVE

IN

ENGLAND.

BY JOHN ALLEN.

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INQUIRY,
&c.

TRANSCENDENT ATTRIBUTES OF THE KING.

To unlearned persons desirous of understanding the constitution of England, the transcendent attributes ascribed to the King, in his high political capacity, must prove a grievous stumbling block at the very commencement of their studies.

They may have heard that the law of England is founded in reason and wisdom. The first lesson they are taught, will inform them, that the law of England attributes to the King absolute perfection [1], absolute immortality [2], and legal ubiquity [3]. They will be told, that the King of England is not only incapable of doing wrong, but of thinking wrong, that he cannot mean to do an improper thing, that in him there is no folly or weakness [4]. They will be informed that he never dies [5], that he is invisible as well as immortal [6], and that in the eye of the law he is present at one and the same instant in every court of justice within his dominions [7].

[1] Blackstone, i. 246. [2] Ib. i. 249. [3] Ib. i. 270.
[4] Ib. i. 246. [5] Ib. i. 249.
[6] Howell's State Trials, ii. 598. [7] Blackstone, i. 270. iii. 23.

They may have been told, that the royal prerogative in England is limited: but, when they consult the sages of the law, they will be assured, that the legal authority of the King of England is absolute and irresistible, that he is the minister and substitute of the Deity; that all are under him while he is under none but God [1].

They may have read of oriental despotism, and pitied the lot of nations that have no property in the soil they tread, and hold at the will of a master the lands they are permitted to cultivate. What then must be their surprise, when, turning to their domestic oracles, they are informed, that in the contemplation of law, the whole soil of England belongs to the King, and, if a learned judge is to be trusted, that for certain purposes he may enter thereon at his pleasure [2]; that he is the universal lord and original proprietor of all the lands in his kingdom [3]; that in the law of England there is no proper allodium, or land not held mediately or immediately of the King; and that no subject can have more than the usufruct or beneficiary enjoyment of the land he occupies [4].

If they have had the benefit of a liberal education, they may have been taught, that to obtain security for persons and property, was the great end for which men submitted to the restraints of civil government; and they may have heard of the indispensable necessity of an inde-

[1] Blackstone, i. 251. [2] Ib. ii. 415.

[3] Tout fuit in luy et vient de luy al commencement. Y. B. 24 Edw. III. f. 65. b.

[4] Blackstone, ii. 51. 59, 60.; iv. 418.

pendent magistracy for the due administration of justice: but, when they direct their inquiries to the laws and constitution of England, they will find it an established maxim in that country, that all jurisdiction emanates from the crown. They will be told, that the King is not only the chief but the sole magistrate of the nation, and that all others act by his commission and in subordination to him [1].

Individuals, they know, are liable in every country to suffer from violence and oppression; but in England they will be assured, that though the actual sufferer be a private individual, the person injured in the eye of the law is the King, because he is the general conservator of the public peace; and from these premises, they will be told, arises the royal prerogative of pardoning offences, because it is reasonable that he who is injured should have the power to forgive [2].

In addition to these transcendent attributes possessed by the King of England in his political capacity, they will find that he has the power of the sword; that the armed force of the nation is at his sole disposal; that the government and command of the militia, that all the forces by sea and land, that all castles and fortresses belong to him; and that an impassable barrier environs his dominions, of which he is the sole and undisputed lord [3]. They will also be told, that he is the fountain of honour and dignity; that he represents the majesty of the whole

[1] Blackstone, i. 250. 266.
[2] Ib. i. 268, 269.
[3] Ib. i. 262—264.

community[1]; that he is the delegate and representative of the kingdom with respect to foreign powers; that his acts are the acts of the nation; that he can make peace or war at his pleasure, and bind his subjects by the engagements he contracts and the treaties he ratifies[2].

As some of these transcendent attributes are incompatible with our notions of a finite, corporeal, and mortal being, it may possibly occur to an inquisitive and reflecting student, that they belong to an ideal personage, who has no existence in nature, and is a mere fiction of the imagination.

On further inquiry he will find this conjecture not entirely destitute of foundation. He will be told that the king is, and ever has been, a corporation sole[3]; that a corporation is an artificial person that never dies[4]; that is invisible, and exists only in intendment and consideration of law; that has no soul, and cannot therefore be summoned before an ecclesiastical court or subjected to spiritual censure; that can neither beat or be beaten in its body politic, nor commit treason or felony in its corporate capacity; that can suffer no corporal punishment or corruption of blood, and can neither be imprisoned or outlawed, its existence being merely ideal[5]. So far he will be satisfied that the King of England, as described in law books, is in some sense an ideal personage.

King is a corporation sole;

It may be said, indeed, that the King is not more an ideal personage than a parson or other corporation sole;

[1] Blackstone, i. 271. iv. 2. [2] Ibid. i. 252. 257.
[3] Ibid. i. 469. 472. [4] Ibid. i. 467, 468. [5] Ibid. i. 477.

that it is merely the office, which is converted by a fiction of law into a person; and that the object of this transmutation is to have the same identical rights kept on foot, and continued for ever by a succession of individuals, possessing the same privileges, and charged with the same duties. But, on reflection, it will appear that there is a wide difference between the King and other corporations sole. A parson considered as a corporation is an artificial and ideal personage as much as the King. But the rights a parson possesses, the qualities attributed to him, and the duties he has to perform in virtue of his office, are such as, in his personal capacity, he may sustain, exercise, and enjoy. The law, that converts him into a corporation, requires from him no impossibilities, and ascribes to him no attributes incompatible with his character as a limited and created being. He is bound to preach and pray, but he is not supposed, in the contemplation of law, to preach and pray at one and the same instant in every corner of his parish. He must be learned and orthodox, but he is not held to be perfect in learning or exempt from error in opinion. He must be moral in his conduct, and ought to be innocent in his thoughts; but he is not esteemed incapable of doing or of thinking wrong. He has the same rights, and is reputed in law to be the same person with his predecessor, who lived centuries ago; *quatenus* parson he never dies any more than the King. But it is not thought necessary for the continuance of his office, and the preservation of its rights and immunities, that one incumbent should

but different from other corporations sole.

follow another without interval or interruption. When he dies, time is given for the appointment of a successor, and though the office is vested in no one during that period, the corporation is not supposed to be thereby extinguished. But rule and government, as established in England, cannot exist *for a moment* without some one filling the office of King[1].

Ideal theory of the English monarchy.

There is therefore something higher, more mysterious, and more remote from reality, in the conception which the law of England forms of the King, than enters into the notion of a corporation sole. The ideal King of the law represents the power and majesty of the whole community. His *fiat* makes laws[2]. His sentence condemns. His judgments give property, and take it away. He is the state[3]. It is true, that in the exercise of these powers, the real King, to whom they are necessarily entrusted, is advised, directed, and controlled by others. But in the contemplation of law the sovereignty and undivided power of the state are in the King.

[1] Attorney-General's Speech in Hardy's Trial. Howell's State Trials, xxiv. 246.

[2] In an argument before the Court of King's Bench, in 23 Edw. III. it was said, "Que le roy fist les leis par assent dez peres et de la commune, et non pas lez peres et la commune." Y. B. 23 Edw. III. f. 3. b.

[3] ——"The person of the king, in name, is the state. He is to all intents and purposes the sole representative of the state." Solicitor-General's Speech in Hardy's Trial. Howell's State Trials, xxiv. 1183.

It is not my intention to dispute the truth or reality of this view of the constitution of England. However hazardous it may appear to make the rule and government of a great nation depend on the life and health of a single individual, subject to all the casualties and infirmities of human nature; however extravagant it may seem to attribute to one member of the community, as chief and representative of the commonwealth, the entire power and authority of the whole; there cannot be a doubt that such is the constitution of England, as laid down most strongly and emphatically in the works of lawyers, and in the homilies of churchmen [1]. Still less am I about to question or discuss the wisdom or expediency of this artificial system of policy in the ordinary acts and operations of government. Where it seems most liable to objection, it is qualified and corrected by other maxims and principles of constitutional law, that render it innoxious, or mitigate, at least, the dangerous consequences that seem at first sight necessarily to flow from it. The King, it is true, can do no wrong, and is not amenable to any earthly tribunal; but, on the other hand, he can perform no one political act without an adviser, responsible for the same. He cannot be sued in a court of law; but if any one has a demand against him in point of property, a petition or plea of right is due to the claimant, through which justice will be obtained with as much certainty and despatch as in actions between

Corrections in practice.

[1] Blackstone, i. 251.

man and man [1]. He has the sole power of raising and regulating fleets and armies [2]; but he cannot raise or keep a standing army within his kingdom in time of peace without consent of parliament [3].

By these and other checks the exorbitant prerogative of the crown is kept in England within bounds. It is fortunate for us such restraints exist, and that on the whole they have been found effectual. For the absolute sovereignty and transcendent dominion of the King, as laid down by lawyers without restriction or limitation, leave the subject without protection against the crown, and convert government, which was intended for the general good, into a private patrimony for the benefit of the King and of his heirs. But though these doctrines are in practice harmless, the wonder is not the less how they were first invented, and through what means they found admission into the law of England, so justly celebrated for its regard to the property and liberties of the people. The subject, though curious, seems to me to have attracted less attention from those who have traced the progress of our constitution, than its importance as an historical question deserves.

MONARCHICAL THEORY OF MODERN EUROPE.

It is in the first place to be observed that the fiction of an ideal King, to whom all the powers of sovereignty

[1] Blackstone, i. 243. iii. 256. [2] Ibid. i. 262.
[3] 1 Gul. et Mar. Sess. ii. c. 2.

are confided, is not peculiar to England. It is to be found in all the monarchies of Europe, established on the subversion of the Roman empire. However different in other respects, all these governments agree in recognizing as the fundamental principle of their constitution that the sovereign power of the commonwealth resides in the King. It is in the next place a coincidence not less remarkable, that, after laying down this principle in terms the most general and unqualified, they all agree in admitting certain constitutional checks and limitations on the exercise of the supreme and absolute authority with which he is vested. What the law appears to give, long established usage is supposed, in the most arbitrary governments, to moderate and restrain. In theory the King of France, before the revolution, was held in law to be an absolute, but in practice to be a limited, monarch. His power was said to be supreme, but it was to be administered according to fundamental laws. He was the source of all authority civil and political; but he was to govern by the fixed courts and magistracies of his kingdom. His will was law, and, as such, was to be obeyed; but in issuing his commands, he was bound to respect the honour and even the prejudices of his subjects. He was the judge of his people, but he could not exercise any judicial function in person. He was the sole proprietor of land in his kingdom, but he could deprive no man of his inheritance, unless by a judgment of law, over which he had no control. If he transgressed these

rules, he ceased to be a King, and degenerated into a despot [1].

Antiquity of this theory.

This opposition between monarchy in theory and in practice is as ancient as the existence of regal government in modern Europe. We find it in the earliest records of the Barbarians after their establishment in the empire, and the collisions to which it has given rise between kings and their subjects form none of the least interesting portions of the history of the middle ages. The farther back we carry our researches the stronger is the evidence we discover, that, however the monarchical theory may have been proclaimed in law books and magnified by churchmen, it was never reduced, strictly and completely, to practice; nor was it ever recognized or quietly submitted to by the people as the government handed down to them by their ancestors. We meet with continual struggles between Kings and their subjects, in which both parties appeal to their rights in support of their pretensions. If the King claims the prerogative vested in him by law, the people oppose to him ancient usages and privileges that restrain its exercise. On some occasions the King has proved victorious. At other times his subjects have had the advantage. Every nation in its turn has been threatened with anarchy or subjected to despotism. Like the good and evil principles of the Persian magi, liberty and prerogative have been in perpetual conflict; and though in this country, and latterly in France,

[1] Esprit des Loix, ii. 1, 4; iii. 8, 10; vi. 5; viii. 6; xxvi. 15.

the better principle has gained the ascendancy, arbitrary power has more frequently prevailed, and by force or artifice has extended its empire over the fairest portions of the continent. But in no country, where the forms of royalty have been retained, has the feud been ever completely extinguished. In the most limited monarchy the King is represented in law books as in theory an absolute sovereign. In countries, where the constitutional checks to his will are the least powerful, there are obstacles, more or less effective, to his caprices. But where a government presents such contradictions between its theory and practice, it cannot have been founded originally on any uniform or systematic plan. The theory, which ascribes absolute power to the monarch, cannot have been derived from the same principles that oppose constitutional checks to his prerogative. Such a government is manifestly the result of two separate, independent forces, acting in different directions, and producing, as they alternately preponderate, an inclination, sometimes to liberty, at other times to despotism. Nor is it difficult to discover from what sources these impelling forces had their origin.

Not derived from the ancient Germans,

It is plain the monarchical theory cannot have been derived from the ancient Germans. In the most considerable of the Germanic tribes the form of government was republican. Some of them had a chief, whom the Romans designated with the appellation of King, but his authority was limited, and in the most distinguished of their tribes the name as well as the office of King was

unknown (A). The supreme authority of the nation resided in the freemen of whom it was composed. From them every determination proceeded that affected the general interests of the community, or decided the life or death of any member of the commonwealth. The territory of the state was divided into districts, and in every district there was a chief, who presided in its assemblies, and, with the assistance of the other freemen, regulated its internal concerns, and in matters of inferior importance administered justice to its inhabitants. These chiefs met in council by themselves, and discussed, in private, affairs relating to the general welfare; but their resolutions had no authority, till they had been confirmed and ratified by the general assembly of the tribe (B). When a national war was undertaken, one of the chiefs was selected to command the army; but on the return of peace his rank and authority as general ceased, and he reverted to his former station. This form of government subsisted among the Saxons of the continent so late as the close of the seventh century, and probably continued in existence till their final conquest by Charlemagne (C). Long before that period, however, the tribes that quitted their native forests and established themselves in the empire, had converted the temporary general of their army into a permanent magistrate, with the title of King (D). But that the person decorated with this appellation was invested with the attributes ascribed to royalty in after times is utterly incredible. Freemen, with arms in their hands, accustomed to participate in the exercise of the

sovereign power, were not likely, without cause, to divest themselves of that high prerogative, and transfer it totally and inalienably to their general. Chiefs, who had been recently his equals, might, in consideration of his military talents, and from regard to their common interest, acquiesce in his permanent superiority as commander of their united forces; but it cannot be supposed that they would gratuitously and universally submit to him as their master. There are no written accounts, it is true, of the conditions stipulated by the German warriors with their general when they converted him into a King. But there is abundance of facts recorded by historians, which show beyond a doubt, that, though he might occasionally abuse his power by acts of violence and injustice, the authority he possessed by law was far from being unlimited (E).

but from the Roman Provincials.

Widely different was the condition of the Provincials. Whatever were the artifices by which Augustus had disguised his usurpation of the sovereign power, they had been long since laid aside. Whatever had been the moderation he affected in the exercise of that authority, it had been long since discarded by his successors. The government of the Roman world had been for ages a pure, unmitigated despotism, in its worst and most odious colours. The prince possessed in theory, and exercised in practice, every power of the state. He was invested with the most ample and most absolute authority ever enjoyed by man. The legislative, judicial, and executive functions of government, were united in his person,

and used according to his caprice. He was the sole magistrate of the commonwealth, the others being merely his delegates, and answerable only to him. The lives, liberties, and properties of his subjects, were at his mercy. His word was law, his sentence without appeal, and the course of judiciary proceeding dependant on his will. He could impose what taxes he pleased, and levy them at his discretion. He had the right of peace and war, the sole and exclusive command of the army, the power to levy troops, to appoint and displace their officers, to regulate their discipline, and to reward or punish them without control. There was no authority in the state, civil or political, that was not derived from him, and was not revocable at his pleasure. The only barrier against his vices was the power of the military, whose support or defection raised him to the purple or precipitated him from the throne. The christian clergy had acquired a sectarian influence over their flocks, but they had not yet ventured to interfere with the civil power, or attempted to regulate and disturb the state. If they ever exercised control over the imperial despot, it was by their authority over his conscience, and by appeals to his piety or superstition. It was an ascendancy entirely spiritual, unconnected with temporal dominion.

In what manner introduced among the Barbarians.

From this contrast of imperial despotism with the free institutions and independent character of the Germanic tribes, it is impossible to mistake the origin of that monarchical theory, which soon began to rear its head in every country occupied by the Barbarians. Repugnant

to the genius, and at variance with the usages and ideas of the Germans, it was a phantom borrowed from imperial Rome, and insinuated by its servile ministers into the legal forms and language of their conquerors. It was the doctrine of civilians that the Roman people had transferred to their emperor the whole power and authority of the state, in consequence of which he became the sole organ and representative of the commonwealth. Whatever he pleased to ordain, was law. Whatever he commanded, was to be obeyed. These maxims had been theoretically established and practically enforced for ages when the empire became a prey to the Barbarians. The conquerors, accustomed to different notions of government, were not inclined to part with the liberty and freedom from restraint, which they had enjoyed in their native woods. But the new situation in which they were placed, their dispersion over a vast territory, amidst nations they had subdued and plundered, made it necessary, for their common safety, to strengthen the arm of government, and intrust to a few what had formerly been the property of the whole. In practice, they gave up as little as possible of their ancient independence, and when roused by a sense of real or imaginary wrong, they were ready at all times to assert with their swords the rights they had inherited from their ancestors. But, in the changes that became necessary in their written laws, in the instructions to public officers for the administration of their internal government, and in the legal forms required

for the secure possession and transmission of property, to which they had formerly been strangers, they were compelled to have the aid of provincial churchmen and lawyers, the sole depositaries of the religion and learning of the times. These men, trained in the despotic maxims of the imperial law, transfused its doctrines and expressions into the judicial forms and historical monuments of their rulers; and thus it happened, that if the principles of imperial despotism did not regulate the governments, they found their way into the legal instruments and official language of the Barbarians (F). An imaginary King or prince was created, in whom, by a legal fiction, was invested all the power and majesty of imperial Rome (G). The same names were even affected. The Barbarian, who had recently exchanged his title of *heretoga* for that of King (H), was persuaded to style himself Basileus, in imitation of the eastern emperors, or to prefix the appellative Flavius to his name; his sons and cousins were called Clitones or illustrious; his servants became Palatine officers, and his crown an Imperial diadem.

Condition of the Provincials under their new masters.

Abject and degraded as the Provincials had become in the last ages of the empire, they were superior in knowledge and mental attainments to their conquerors, and speedily acquired an influence in the direction of their affairs. As a body they were placed on an inferior footing, the life of a Barbarian being estimated at twice the value of that of a Roman of the same condition; but individually they found admission into the courts and

palaces of their new masters, and were elevated to the highest offices of the state, and received among the guests or companions of the King. Churchmen for several generations were taken almost exclusively from their ranks[1]; and as the Barbarians, on their conversion, transferred to the Christian clergy the veneration and deference they had entertained for their ancient priests, the class from which churchmen were selected could not fail to obtain consideration and respect. Bishops were employed in secular concerns, intrusted with embassies, invested with judiciary authority, and placed on a par with the chiefs and magistrates who directed the affairs of government. Though the empire was subverted, every thing Roman was not destroyed. The distinctions of rank and condition in the great body of the provincials were maintained. The Roman proprietor was despoiled of part of his lands, but he was secured in the possession of the rest. The Roman law continued in force, as the personal law of the vanquished, in every part of the continent subjected to the dominion of the Barbarians. In many of the countries they subdued, it finally predominated over their original customs; and in all it entered largely into the collections and codes of law which they subsequently framed for their own use. The municipal institutions of Rome survived, in all or in most of her provinces, the destruction of her empire, and came at length to be amalgamated and indissolubly united with the in-

[1] Fleury, Hist. Eccles. xiii. 27. Edition of 1721. Montesq. Espr. des Lois, lib. 30. ch. 12.

ferior magistracies of her conquerors[1]. Is it then to be wondered at that the political maxims and principles of her government insinuated themselves into the states erected on her ruins, and tainted, if not the substance, the forms at least and language of their public law?

Progress of the monarchical theory among the Barbarians.

When the servile language of the empire was first addressed to their rulers, the rude and illiterate Germans must have disregarded and despised the unmeaning flattery of the abject herd they had subdued. They could hear with indifference their kings invested with the plenitude of despotic authority, and proclaimed the representatives and sole depositaries of the national power. They looked, not to parchments and to legal forms, but to their valour and to the recollections of their ancient freedom, for the preservation of their rights; and with the carelessness and improvidence of Barbarians, they tolerated and tacitly acquiesced in the exaltation of their rulers, so long as it was confined to words and empty declarations. When roused by long-continued and wide-spreading oppression, or provoked by taxes and impositions without their consent, they flew to arms, and punished with merciless severity the authors and instigators of these iniquities. But if the oppression was local and occasional, it excited no general sympathy in their minds. They were accustomed to inflict or endure violence and injustice; and whether these proceeded from governments or individuals, none but the actual sufferers

[1] Savigny's History of the Roman Law in the Middle Ages, i. 274, 295—306, 387—433.

complained or called for redress. We must not, therefore, judge from particular acts of power of the general spirit of their government; nor allow ourselves to be misled by the judicial forms and expressions it was suffered to employ. The Barbarian, who had justice done to him in the ancient tribunals of his nation, inquired not in whose name it was administered. If he obtained the lands he wanted, it was indifferent to him in what form they were granted. He received them from the public authorities of the state, and cared not whether, in the act of donation, they were described as gifts of the King or of the kingdom.

Imitations of the Imperial Court by the Kings of the Barbarians;

The Kings of the Barbarians were delighted with the titles and trappings of the empire, and indulged with childish vanity in the imitation of Roman forms and customs. Edwin, a petty King of the Northumbrians, had a standard-bearer to precede him in his progresses through the kingdom, and was not content to go from one house to another without a Roman tufa carried in procession before him[1]. Leuvigild, the Visigoth, had a diadem fashioned for his use, and assumed with it the style and purple robes of the empire. The fierce Odoacer was flattered with the title of Patrician, which, at the request of the Roman senate, he obtained from Constantinople. Even the great Theodoric condescended to accept from the same quarter the rank of Consul and Patrician; and though his good sense rejected the appel-

[1] Bed. Hist. Eccl. ii. 16.

lation and emblems of the Imperial dignity, he established in his court at Ravenna all the titles, offices, and gradations of authority, that had dazzled the Provincials while subjects of the empire[1]. Clovis, in imitation of Theodoric, received from the Emperor Anastasius the empty honours of the Consulate; and after having been decorated with a purple mantle, he had the satisfaction to hear himself saluted Consul and Augustus by his subjects[2]. His sons obtained from Justinian the concession of all the rights of the empire in Gaul; a transaction from which the Abbé Dubos[3] has inferred that the Kings of France acquired a legal right to the absolute authority they afterwards possessed. It is possible that, in the eyes of the Provincials, the cession of Justinian gave a sort of legal sanction to the right of conquest. But the grant was nominal. Gaul had been long separated from the empire. At all events Justinian had no authority and could confer no dominion over the Franks.

When Charlemagne revived the western empire, he had too much sense to ape the manners of the Imperial Court in his intercourse with his Germanic subjects. In his dress he retained the ancient simplicity of his countrymen[4]; and in his public acts, with the title of Emperor,

[1] Theodoric not only restored the state and household of the Emperors, but preserved entire their provincial government, and filled with Romans almost all the offices in those various departments.—Savigny, i. 320.

[2] Gregor. Tur. ii. 38.

[3] Hist. Crit. v. 10; vi. 1. 16.

[4] Eginhard.

he continued to style himself King of the Franks. His feeble successors were not satisfied with this moderation. His grandson Charles wore the ornaments and introduced the ceremonial of the Byzantine Court; and disdaining the appellation of king, he insisted on being called Augustus, and Emperor over all the Kings of the West[1]. In imitation of this folly, under pretence of maintaining their independence, the petty kings and princes in England and Spain assumed and made ridiculous the Imperial titles they asserted[2].

but their real power continued limited.

But, amidst the honours and decorations with which royalty was clothed by its flatterers and admirers, the rough garment of the Barbarian was seen to peep from under the borrowed purple of the empire. The real King, to whom these imposing titles and high-sounding claims were attributed, remained, as before, the chief of a warlike and turbulent people, regardless and hardly conscious of this fictitious change in his condition. The ideal King of the churchmen and civilians was an absolute prince, in whom were centred the whole power and majesty of the state. The real King, limited in his authority by ancient usage, depended on his personal qualities for the degree of power he possessed; and when seduced by his imaginary dignity to extend the bounds of his prerogative, he had not unfrequently to pay, with his life or deposal, the penalty of his rashness and presumption. After a time, however, the language of adulation, re-

[1] Théorie des Loix Politiques de France, viii. Preuves, 283.

[2] Ducange. Gloss. Imperator.

Gradual progress of royal authority.

peated in every act and instrument of government, produced its effect. Men, accustomed to hear their prince described as the source and depositary of their laws, began to think there must have been some ground for the assertion. The real power of the King, as general in war and chief magistrate in peace, when seasonably enforced and skilfully improved, enabled him to prosecute on many occasions with success his encroachments on the ancient usages and privileges of the nation. Order was maintained and justice administered in his name; and as respect for order and justice gained ground, his subjects, who considered themselves indebted for these blessings to his care, were often induced to acquiesce in pretensions and submit to usurpations, which had no other origin than a theory of government, founded on fiction, borrowed from a foreign law, and fortified by time, because it had been suffered to pass without contradiction by those who, rejecting its authority in practice, were hardly aware of its existence in words. After many a struggle between liberty and prerogative, the result has been in England that the real power of the King has been limited and defined by constitutional law and usage, but that the old attributes are still ascribed to him in law books; that an incongruous mixture of real and imaginary qualities has been formed, which has been called the union of his natural with his mystic or politic capacity; and that many privileges and peculiarities have been assigned to him in his natural person for reasons derived from his ideal or politic character.

In one respect the ideal King of the Barbarians was induced by his churchmen to make a higher pretension than had been ever claimed or asserted by the Roman Emperors. The latter, however tyrannical in their conduct, professed to derive their power by delegation from the people; and in proof of that delegation their lawyers referred to the celebrated Lex Regia, by which the Roman people were supposed to have conferred on their prince the whole power of the commonwealth[1]. But the ideal King of our ancestors, under the tuition of his clergy, was taught to derive his power from Heaven. Though raised to the station he held, by the election of his people, the nomination of his predecessor, or the cabals of his partisans, the instant he attained that dignity, he was made to style himself King by the Grace of God[2]. In imitation of the Jewish monarchs, he was anointed with oil and consecrated by a priest; and to impress a greater sanctity on his character, he was saluted as the Vicar of Christ over Christian people[3]. These

Divine origin attributed to monarchy.

[1] Quod principi placuit, legis habet vigorem; utpote cum Lege Regia quæ de imperio ejus lata est, populus ei et in eum omne suum imperium et potestatem conferat.—Pandect. l. 1. t. 4. See also Instit. Tit. 2. § 6; and Codex, l. 1. t. 17. § 7.

[2] Wilkins, Ll. Anglo-Saxon, 14. Selden's Works, iii. 128. Mabillon de Re diplom. l. 2. c. 3. The letter of Pope Gregory to Ethelbert, King of the Kentishmen, insinuates to that Prince, in no ambiguous terms, that he had been set over his people by the special appointment of Providence.

[3] Wilkins, Ll. Anglo-Saxon, 112. 116. 147. In the acts of a synod or council held at Cealchythe in 785, the petty King

pretensions, which have given rise to so much idle discussion in times comparatively modern, are as ancient as the Anglo-Saxon period of our history. Under the Normans and Plantagenets they were not abandoned. Henry I., notwithstanding the irregular steps by which he mounted the throne, styles himself King by the Grace of God[1]; and his grandson, one of the most imperious of our princes, in a controversy he maintained with the Bishop of Chichester concerning the immunities of Battle Abbey, had the hardihood, in the presence of his assembled nobles and clergy, to assert that his royal dignity was given to him by God[2], though there were many present who must have known that he had obtained it by a convention with Stephen guaranteed by the great men of the kingdom.

But if Kings derived their power from Heaven, it was held there could be none on earth to control them, or call them to account. However capricious or tyrannical their conduct, it was the duty of subjects to obey, or at least to oppose no active resistance to their commands.

of the Mercians is repeatedly called Christus domini; and texts are accumulated from Scripture, to show that his person is sacred and inviolable. Wilk. Conc. i. 148. In a Saxon homily quoted by Wheloc (Bede, 151) the King is styled Vicar of Christ, consecrated to be Shepherd of the Christian people whom Christ has redeemed, and Christ is said to have given him authority under himself.

[1] Charter to Archbishop William, and to the minister of Christ Church, Canterbury. Lye's Diction. App. [2] Spelman Conc. ii. 58.

Rebellion was declared to be sacrilege; and the persons guilty of so heinous a crime were excommunicated, and devoted to eternal perdition in company with the devil and his angels[1]. Texts from St. Paul, intended to inculcate obedience on Christian people under every species of government, were restricted by these commentators to the government of Kings; and what is almost incredible, the prophetic denunciations of Samuel against kingly government were adduced as proofs from Holy Writ, that Kings may lawfully do what they please, and that it is sinful to oppose their will[2].

MONARCHICAL THEORY OF ENGLAND.

On this double basis has been erected in England, as in other parts of Europe, the theory of monarchical government. The King has been invested by law and religion with a character at once despotic and divine. His office has been deemed sacred as a delegation from Heaven, and the sacredness of his office has been communicated to his person. In law, his prerogative has been held to be the same with that claimed or possessed by the Roman Emperors. In practice, it is true, his power has been differently considered. There is no country in Europe where some limitation has not been opposed to the ideal despotism of the monarch. In England the checks are numerous and powerful; but still, in theory, the authority of the King is held to be supreme. In the

[1] Conc. Tolet. iv. 75. [2] Mably, Obs. sur l'Hist. de France, l. 1. ch. 3.

language of the greatest lawyers even of the present day, the whole power of the state is said to be vested in the King[1]. To reconcile practice and theory, without abandoning the fiction on which theory was founded, many evasions and subterfuges have been invented. The King is the supreme and sole legislator, say the lawyers; but, according to the constitution of England, he can neither enact nor alter laws without the advice and consent of his Lords and Commons. He is lord of the soil; but, by the law of England, he can dispossess no man of his inheritance except by judgment of his peers. He is universal occupant; but he "cannot touch a blade of grass or take an "ear of corn" without leave of his Commons[2]. He is supreme in his judicial functions; but, by long-continued usage, it is an established maxim of the constitution, that he must exercise them by his judges. He is supreme and absolute in the execution of the laws; but he can perform no one act of executive magistracy without the assistance of others who are responsible for what they have done[3]. It is not, however, to these checks and

[1] Attorney-General's speech in Hardy's Trial. Howell's State Trials, xxiv. 243. When Louis XIV. in the pride of despotism exclaimed, "L'état! c'est moi," he claimed no more than Mr. Attorney ascribes to the King of England.

[2] Bacon's Abr. Prerogative, b. 1.

[3] The monarchical theory of the English government, with some of its most important practical connexions, is thus laid down by one of the most eminent lawyers of the present day:— "The power of the King, in name, is the state itself. All the "powers of the state, legislative and executive, are nominally

limitations of the royal prerogative that I wish at present to direct the attention of my readers. My object is to show in what manner the reasonings of lawyers and established maxims of constitutional law with respect to the real King have been warped and perverted by considerations drawn from his ideal prerogative. For this purpose it will be necessary to go back to the more ancient authorities, as modern lawyers, while they repeat the expressions and adopt the conclusions of their predecessors, bring less distinctly into view the original theory on which they were founded.

Two bodies or capacities in the King of England.

The student, who consults our early authorities on constitutional law, will be told, that the King of England has in him two bodies or capacities; that he has a natural body, and a politic or mystical body; that his natural body is subject to the casualties and infirmities of other men, but that his body politic is utterly exempt from weakness or passion, secure alike from the helplessness of infancy and from the imbecility of age: that these two bodies, thus differently constituted, exist not

"in him. Not really, because the King can make no law but "by the advice and with the assent of the Lords and Com- "mons in parliament. He can execute no law but by his "judges and other ministers of justice, according to a formed "and regular establishment. He really does nothing, but he "nominally does every thing. The consequence is, that he is, "to all intents and purposes, the state; and in his name every "act is done."—Solicitor-General's Speech in Hardy's Trial. Howell's State Trials, xxiv. 1183.

apart, but are incorporated in one person; making one body, and not two bodies—corpus incorporatum in corpore naturali, et corpus naturale in corpore corporato—in such a manner that the politic body includes in it the natural body, and the natural body has in it the politic body. He will be further told, that, when the King dies, his politic body escapes from his natural body, and, by a sort of legal metempsychosis, enters into the natural body of his successor; but, while he is alive, that the two bodies are indissolubly united and consolidated in one, the whole possessing the properties, qualities, and degrees of the politic body, which is the greater and more worthy, and, as such, draws to itself the other, and communicates to it its own virtues and endowments; and he will be assured it is for this reason that acts done by the King in his politic capacity cannot be set aside or impaired for defects or disabilities in his natural body. It will be afterwards explained to him, that if the natural body of the King is thus magnified by its conjunction with his politic body, it communicates to the latter in return qualities and powers which, as an impassible body, it could not otherwise have enjoyed. It is, for instance, by means of his natural body that the King is enabled to have children to inherit his kingdom; for, as we are told by Lord Chief Justice Dyer, to engender issue is the office of his natural and not of his politic body[1].

[1] Howell's State Trials, ii. 624. Calvin's Case. Plowden, 213. 217. 234, &c.; cases of the Duchy of Lancaster, and of Wyllion *v.* Barkly.

From this mystical union of the ideal with the real King, the inquirer after constitutional information will be led, through childish reasonings and unintelligible jargon, to practical consequences that are obviously founded on expediency; he will be conducted to other conclusions, that have neither reason nor convenience to plead in their favour; he will meet with vain attempts to reconcile impossibilities, and unnecessary arguments to prove what no man in his senses ever questioned or denied; he will find, in the same author, contradictory assertions on the self-same points; and before his inquiries are brought to a close, he may possibly be led to the conclusion, that many of the prerogatives of the real King have been surreptitiously introduced and established under the colours of his ideal prototype.

Influence of his natural on his politic capacity:

He may have imagined that it was in order to prevent the mischiefs of an elective monarchy that royalty was made hereditary in England. But when he turns to his learned instructors, he will be told, that it is in consequence of the King's natural body having an operation on his politic body, that the crown goes by descent, and not by succession, as in other corporations[1].

in making the crown hereditary;

in protecting his Queen and eldest son from treason.

He may have heard that the life of the Queen, and the life of the King's eldest son, are protected by the statute of treason; and he may have fancied it was from respect for the King and regard to the succession, that

[1] Howell's State Trials, ii. 598.

this protection was extended to them. But when he looks more deeply into the matter, he will find that it arises from the "mutual aid and reciprocal intercourse, influence, and communication of qualities" between the King's natural body and his body politic. His politic body gives dignity to his natural body. His natural body enables him to have a wife and child; and from the dignity it has acquired by its incorporation with his politic body, it confers on them the same protection from treason which he enjoys himself, though the body politic be entirely in him and no part of it in them. That the protection given by the statute of treason to the Queen and eldest son of the King is effected by an operation of law proceeding from the dignity of the natural person of the King, no one can doubt "for you shall never find," says Sir Edward Coke, "that any other corporation whatsoever, of a bishop or master of a college, or Mayor of London, worketh any thing in law upon the wife or son of the bishop or the mayor[1]." It would be idle to ask how it happens that the dignity of the King's natural body stops short at his eldest son, and extends not to his other children; or why a protection by statute was necessary, if the object was already accomplished by an operation of law.

Influence of his politic on his natural capacity.

If in these instances there is a communication of qualities from the real to the ideal personage, we shall

[1] Howell's State Trials, ii. 598.

find, in other cases, the attributes of the ideal King transferred with a liberal hand to his visible representative.

King cannot be nonsuit, nor appear in a court of law by attorney.

When we say that the King is always present in his courts of law, this must be understood of his ideal and not of his actual presence, as it is impossible for the real King to be in two places at once. But when we are told, that in consequence of this legal ubiquity the King can never be nonsuit, for nonsuit is a desertion of the suit or action by the non-appearance of the party in court; and that he can never appear in court by his attorney, for in the contemplation of law he is always present; it is plain that we pass from his ideal to his real existence, and invest him with qualities in his real person that belong to him only in his ideal character. It is because the ideal King is held to be always present in his courts of justice, that the law has determined the real King can never be nonsuit, nor appear by attorney [1].

There can be no laches in the King.

When we are told it is a standing maxim of English law, that in the King there can be no negligence or *laches*, and therefore no delay will bar his rights, because in the intendment of law he is always busied for the public good, and has not leisure to assert his rights within the times limited to his subjects [2], it is clear that in the premises we consider the ideal King, who is supposed to be always occupied for the public good, and from this hypothesis draw a conclusion which we apply to the real King, who

[1] Blackstone, i. 270. [2] Ibid. i. 247.

may be employed, without a thought of the public, in his own private pleasures and amusements.

King cannot be an infant, lunatic, or traitor.

As the ideal King is all-perfect, free from stain or blemish, and equally competent at all times to discharge his royal functions, it is held that the real King, though an infant, is of full age; though a lunatic, in his senses; and though an adjudged traitor, it has been decided that his assumption of the crown purges him at once from all attainders [1].

Reasons why the King cannot be a minor.

We are gravely told by lawyers [2], that the King as King cannot be a minor, because "the politic rules "of government have thought it necessary that he, "who is to govern and manage the whole kingdom, "should never be considered as a person incapable of "governing himself." That is to say, because the law has attributed to the ideal King the entire management and government of the realm, it considers the real King, though a babe in swaddling clothes, to be a person of years and discretion. How much more sensibly has another author of the name of Bacon [3] considered the question. "There is no infancy," he observes, "in the "crown, though in the person; because the wisdom of "the crown is not intended to rest in one person, but in "the counsels of many, who are equally wise, whether "the person of the King be old or young."

No action can be raised against the King.

The ideal King is the fountain of justice, and there-

[1] Blackstone, i. 247. [2] Bacon's Abridg. Prærogative A.

[3] N. Bacon, Discourses on the Law and Government of England.

fore no court can have jurisdiction over him. From this principle it is deduced as a consequence, that no suit or action can be brought against the real King, and that his person must be sacred, because there can be no tribunal that has a power to try him [1].

King can do no wrong.

It is held that the King can do no wrong, for two reasons; first, because his prerogative was created for the benefit of his people, and cannot therefore be exerted to their prejudice [2]; and, secondly, because, if such a case occurred, the law would be incapable of furnishing any adequate remedy, and it would be weakness and absurdity to admit of any possible wrong without the possibility of redress [3]. On this species of logic it may be remarked, that to say there can be no wrong because there is no redress for it, is as reasonable as to maintain there can be no disease for which a physician has not a cure; and to argue, that the prerogative cannot be exerted to the prejudice of the subject, because it was created for his benefit, is much the same as to assert, that an army, which had been raised in defence of the liberties of a country, cannot be employed for their destruction. But, whence arises the impossibility of redress for wrongs done by the King? Because, in the contemplation of law, the King is sovereign and supreme.

King never dies.

The ideal King is immortal in law; but as it is impossible to extend that privilege to his visible representa-

[1] Blackstone, i. 242.

[2] Ibid. i. 246; iii. 255.

[3] Ibid. i. 244.

tive, the lawyers have been compelled to devise an expression, which should obscurely and circuitously convey in words a fact, the possibility of which the law is very *tender* of acknowledging[1]. When the real King dies, they term it his demise, "an expression," says Blackstone, "which signifies merely a transfer of pro-"perty; for, as Plowden has observed, when we say the "demise of the crown, we mean only, that in consequence "of the disunion of the King's natural body from his "body politic, the kingdom is transferred or demised to "his successor." Sir Edward Coke[2] is so cautious of admitting the King's natural mortality, in opposition to the plain language and positive asseverations of the law, that he thinks it necessary to establish the truth of the fact by the dangerous consequences that would result from denying it. "The King *in genere*," says that learned judge, "dieth not; but, no question, *in individuo*, "he dieth; as for example, King Henry VIII., Edward "VI., and Queen Elizabeth; for, otherwise, you should "have many Kings at once." And then he tells a story of one Constable, a sturdy disputant, who was attainted and executed in the time of Philip and Mary, for maintaining that King Edward VI. was still alive.

Legal consequence of this principle.

But, if the law is unable to confer real immortality on the King in his proper person, it considers him in all legal consequences as actually possessed of that privilege. Land given to a man for ever, without any mention of

[1] Blackstone, i. 249. [2] Howell's State Trials, ii. 624.

heirs, vests in him only an estate for life. But if the same grant, in the same words, is made to the King, it creates an estate of perpetual inheritance, because in judgment of law the King never dies[1].

The gift of immortality is not the only instance where the ideal King has not been able to convey entire to the real King the attributes he enjoys in his ideal capacity; and from reluctance on the one hand to abate one jot of the prerogative of the ideal King, and difficulty on the other hand to maintain their actual existence in the person of the real King, lawyers of the first eminence have been reduced to the necessity of contradicting themselves in different parts of the same work. Thus, for instance, we are taught by Blackstone, that "the law ascribes to "the King sovereignty or pre-eminence[2];" though we had been previously told, that "the legislative and of "course the supreme and absolute authority of the state "is vested in parliament[3]." That is to say, in legal theory the ideal King is supreme; but in practice "the "power of parliament is absolute and without control. "It hath sovereign and uncontrollable authority in the "making, confirming, enlarging, restraining, abrogating, "repealing, reviving, and expounding of laws, concern- "ing matters of all possible denomination, ecclesiastical "or temporal, civil, military or criminal; this being the "place where that absolute, despotic power, which must

Sovereignty of the King.

[1] Blackstone, ii. 107. 109.
[2] Ibid. i. 241.
[3] Ibid. i. 147.

" in all governments reside somewhere, is intrusted by " the constitution of these kingdoms[1]."

But, if the power of parliament be " absolute and " despotic," if its authority be " sovereign and uncon- " trollable," it is manifest, that " sovereignty and pre- " eminence" cannot be attributed to the King in the same sense; and, therefore, Blackstone either contradicts himself in these passages, or, when he ascribes sovereignty without qualification to the King, he speaks of the ideal King, who is supposed by a legal fiction to represent and possess the whole power and authority of the state, and not of the real King, who cannot pass a turnpike act without the advice and consent of his Lords and Commons. The ideal King of the lawyers is a King above law; the real King of the constitution is a King subject to law.

The same confusion of language and apparent contradiction of thought are to be found in our earliest writers on constitutional law, and arise from the same inattention to the two different senses in which the word King is employed. When Bracton and the author of Fleta[2] describe the King as the vicar of God and substitute of Christ upon earth, and declare that all are under him, while he is under none but God, they speak of the ideal King, the imaginary representative of the whole community. When they tell us that the King has a

[1] Blackstone, i. 160. 162.

[2] Bracton, l. 1. c. 8. f. 5, 6. Fleta, l. 1. c. 5. § 34. Omnia quidem sub eo, et ipse sub nullo, nisi tantum sub deo.

superior in the law, which made him King, and in his great council, composed of his earls and barons, they speak of the real King of England, who has no authority but what is given him by law, and no power to change the law without the consent of his great council or parliament[1].

Perfection is another attribute of royalty, which the lawyers have found a difficulty in transferring from their own fictitious creation to the real King of the constitution. "The law," says Blackstone[2], "ascribes to the King in "his high *political* capacity absolute perfection." But "notwithstanding this *personal* perfection, which the law "attributes to the sovereign, the constitution has allowed "a latitude of supposing the contrary, in respect to both "houses of parliament," by giving to them "a right of "remonstrating and complaining to the King even of "those acts of royalty which are most properly and per- "sonally his own; such as messages signed by himself "and speeches delivered from the throne." Here, we have *personal* perfection given to the real King, because *political* perfection is attributed to the ideal King; and then, we have this personal perfection qualified and curtailed by the undoubted right of the two houses of par- Perfection of the King.

[1] Bracton, l. 2. c. 16. § 3. f. 34. Fleta, l. 1. c. 5. § 4. In populo regendo, says the last, superiores habet (rex), ut legem, per quam factus est rex, et curiam suam, videlicet, comites et barones.

[2] I. 246, 247.

liament, to remonstrate against acts that are most properly and personally his own.

TARDY GROWTH OF MANY OF THE ROYAL PREROGATIVES.

The difference that still subsists on these particulars between the monarchical theory of lawyers and the real constitution of England, extended in former times to many more branches of the prerogative, and to some even of the highest and most sacred attributes of royalty.

Weregild and mund-breach of the Anglo-Saxon kings.

The immeasurable distance at which the King is placed by law above the other members of the community was unknown in the infancy of the constitution. Our Saxon ancestors distinguished the different classes of society by the difference of their *weregild*, or of the legal composition for their lives, and by the difference of their *mundbreach*, or of the legal penalty for the violation of their *mund* or protection. The Kentish law also exacted different penalties for theft, according to the rank and dignity of the person from whom the stolen property had been abstracted. If we compare in these particulars the protection given by law to the King with the protection it afforded to the other members of society, we shall find that, though in most cases he is highest on the list, the difference between him and those next him in authority is not such as to mark a greater disparity between them than what existed between different classes of his subjects.

The Kentish law was so favourable to ecclesiastical authority, as in the case of theft to exalt the church above the King. If any one stole from a church, he had to pay twelve times the value of what he had stolen. If he stole from the archbishop, he had to pay eleven times the value; if he stole from the King or from a priest in full orders, nine times; and if he stole from an ordinary freeman, three times. These rates were established by the first christian King in Kent, and some of them are repeated in a constitution made by the King and his *witan* four hundred years afterwards[1].

If any one violated the public peace in a *burh* or town belonging to the King or bishop, he had to pay 120*s*. If the offence was committed in the burh of an ealdorman, the penalty was 80*s*.; and if it took place in the burh of a King's thegn, the mulct was only 60*s*.[2]. These rates are stated somewhat differently in the laws of Alfred, but whether from variations in local usage, or from a change in the law, is uncertain. According to Alfred[3], the penalty for breach of the peace in a King's burh was the same as in the time of Ine, that is, 120*s*.; but for the same offence in the burh of an archbishop, it was only 90*s*.; in the burh of an ordinary bishop or

[1] Ll. Æthelb. 1. 4. 9. Lib. Const. Wilkins, p. 110.

[2] Ll. Inæ, 45. The *burh* was a town or village with the district included in its jurisdiction.

[3] Ll. Ælfred. 36. The thegn was called a twelfhynd man, because his weregild was 1200*s*. The weregild of the sixhynd man was 600*s*.; and that of the ceorl or twyhynd man, 200*s*.

of an ealdorman, only 60*s.*; and in that of a thegn or twelfhynd man, only 30*s.* For the same offence in the burh of a sixhynd man the penalty was 15*s*; and, if committed in the close of a ceorl or twyhynd man, it was 5*s.*

In Kent the *mundbreach* of the archbishop was as high as that of the King; among the Saxons and Angles it was lower. By the West Saxon law 5*l.* of good pennies were due for breach of the King's mund; 3*l.* for breach of the archbishop's; and 2*l.* for the mundbreach of an ordinary bishop or of an ealdorman [1]. Among the Angles the rates were the same, with this addition, that the penalty for violating the mund of an etheling or prince of the blood was the same as for the archbishop [2]. These valuations were repeated and confirmed by Canute [3]. They place the King above his subjects; but indicate no such disparity between them as existed in after-times.

The slight degree in which the King was elevated above the higher classes of his subjects appears still more remarkably in the laws of weregild. The Anglo-Saxons had a regular weregild or legal composition for the King as for the meanest freeman in his dominions. By the Mercian law the composition for a ceorl or freeman of the lowest class was 200*s.* or 800 Saxon pennies. The weregild of a thegn was six times that of a ceorl, that is, 1200*s.* or 4800 pennies. The simple weregild of the King was six times that of a thegn, or 120*l.*, that is to say, 7200*s.* or 28,800 pennies; but, for the King as

[1] Ll. Ælfred, 3. [2] Wilkins, p. 111. [3] Ll. Cnut, P. 55.

much more was due to the state, making the whole 240*l.* The simple weregild of the King went to his family; the *cynebot* or composition to the state went to his people[1].

Among the North Angles, or, according to another reading, the Middle Angles, the gradations from the ceorl were different, and the weregilds of the higher classes of society proportionally greater. The weregild of the ceorl was the same as among the Mercians. It was reckoned at 266 *thrymsa*, which are expressly stated to have been equal to 200 Mercian shillings, or 800 pennies[2]. The weregild of a thegn, whether secular or clerical, was 2000 thrymsa, or 6000 pennies; that of a *hold* or high *gerefa* was 4000 thrymsa, or 12,000 pennies; that of a bishop or ealdorman 8000 thrymsa, or 24,000 pennies; and that of an etheling (I) or junior member of the royal family, 15,000 thrymsa, or 45,000 pennies. The King's simple weregild, due to his family,

[1] Wilkins, Leg. Anglo-Saxon, p. 64. 72. It is clear from page 72, that a Mercian shilling contained only four pennies; for we are there told, that six times 1200*s.*, that is, 7200*s.* make 120*l.* But a Saxon pound contained, as our pound does at present, 240 pennies; and, therefore, 120*l.* contained 28,800 pennies, which, divided by 1200, leave 4 pennies for a shilling. The Conqueror calls a shilling of four pennies, *solt Engleis.*—(Leg. Gul. Conq. 13.)

[2] Whatever may have been the thrymsa or tremissis on the continent, there can be no doubt from this passage that in England it was only three pennies; for, we are expressly told, that 266 thrymsa made 200 Mercian shillings.

was the same with that of an etheling; but as much more was due to the state and paid to the people. The whole composition for the King was, therefore, 30,000 thrymsa, or 90,000 pennies, which make 375 pounds of silver, or 1181*l.* 5*s.* sterling.

In the West Saxon laws references are made to the King's weregild [1], but the amount of it is not given. One instance is mentioned in the Saxon Chronicle, where payment for a West Saxon prince, who had mounted the Kentish throne, was exacted from the people of Kent who had risen against him and put him to death; and on another occasion we are told by Bede, that, as the price of peace, legal compensation was made by the Mercians to the Northumbrians, for a brother of the Northumbrian king, himself a petty king, who had been slain in battle [2].

From the whole tenor of the Anglo-Saxon laws it is clear that when the weregild for homicide, and the other penalties for violations of the public peace were discharged, the culprit had no further punishment to apprehend.

No maxim of English law has for ages been better established than that the person of the King is sacred, and that even to compass or imagine his death is treason. It appears, however, from these legal and historical details, that in early times he had no other security for his life than what the law afforded to the meanest of his

[1] LL. Ælfred. 4. [2] Sax. Chron. in 694. Bed. Hist. Eccl. l. iv. c. 21 (K).

subjects. He had the protection of his weregild, and nothing more.

Origin of the sacredness of character attributed to the King.

There is reason indeed to believe that it was not in his capacity of King, but in his character of *hlaford* or lord, that the person of the King became inviolable. Among our ancestors no connexion was more honourable, no tie more sacred, than the voluntary engagement of a man with his hlaford. It might be dissolved by mutual consent, or by infraction of the original agreement on either side. But, while it lasted, the hlaford was bound to fulfil the conditions he had entered into with his man; and the man, on the other hand, was pledged to be faithful and true to his hlaford; to love all that he loved; to shun all that he shunned; and neither wittingly nor willingly, by word or deed, to do aught displeasing to him. Such being the obligations which a man contracted with his hlaford, no crime appeared more heinous than a treasonable breach of that engagement. It is accordingly declared in one of the ancient laws collected by Alfred, and published in his name[1], that if a man compasses the death of his hlaford, it is an offence for which no pecuniary composition can be admitted. The same protection is extended to the King. The crime is in both cases described in the same words, and designated by the same appellation, which, translated literally, may be rendered hlaford treason, or treason against one's hlaford. This provision is frequently repeated in the Anglo-Saxon

[1] Ll. Ælfred, 4.

laws; but no distinction is ever made between treason against the King and treason against other hlafords [1]. There was a difference, indeed, and one of material importance with regard to the extent of the security afforded by the law. The King was considered as the hlaford of the nation [2]; and in consequence of that supposition, the security given to inferior hlafords against their particular retainers was in his case extended to all his subjects. In other respects, the law was the same for both, and continued so for many ages. But in process of time, as the crown rose in dignity and power, a distinction was introduced between treason against the King and treason against hlafords who were in the degree of subjects. The one was called high treason; the other, petty treason. The distinction still subsists in the law of England; but it is only from the ancient law of treason, where no such distinction was known, that the phrase of petty treason becomes intelligible (L).

Another distinction was subsequently made in favour of the crown. In the Saxon law it is the traitorous intention which constitutes the crime. "If any one," says

[1] Ll. Æthelst. 4. Edg. P. 7. Cn. P. 23. 54. 61. Lib. Const. Wilk. p. 110. Conc. Enham. ib. p. 123. The Anglo-Saxon words for hlaford-treason were hlaford searwe or syrwe, and hlaford swice.

[2] He is often called *cyne hlaford.* Wilk. Leg. Anglo-Sax. 69. 110. 116. 119. Sax. Chron. in 1051. Hickes' Diss. Ep. 51, from *cyn,* nation; and sometimes *gecynde hlaford.* Chron. Sax. in 1014; a word from the same root.

Alfred, " plots against the life of his hlaford, he shall " forfeit to the hlaford his life and all he has, unless he " can prove his innocence by the hlaford's weregild." From this principle came the rule of law—voluntas reputatur pro facto—which, according to some lawyers of the greatest eminence, was the general law of England in homicide. It is with diffidence I venture to question an opinion held by Sir Edward Coke and Sir Michael Foster[1]. But, to my apprehension, the text quoted from Bracton[2] by Sir Edward Coke has no relation to this particular point; and the cases he refers to, where it had been adjudged that an attempt to commit murder was a capital offence, though the felonious purpose had not been accomplished, are cases, not of ordinary homicide, but of petty treason. I am therefore inclined to believe, that it was only in treason where the accused was held to be guilty of the crime laid to his charge—licet id quod in voluntate habuerit non perduxerit ad effectum[3]. But, whether this rule obtained in ordinary homicide or was confined to treason, certain it is, that, by the statute of Edw. III.[4], it was abolished in petty treason, while it was retained in high treason. That celebrated statute makes it treason to compass or imagine the death of the King or Queen, or that of his eldest son and heir; but, where a servant plots against the life of his master, or a wife against a husband, or a clergyman against his dio-

[1] 3 Inst. 5. Foster, Crown Law, 193.

[2] Bracton, l. 3. tr. 2. c. 17. f. 136 b. (M.)

[3] Ibid. l. 3. tr. 2. c. 3. § 1. f. 118 b. [4] 25 Edw. III. st. 5. c. 2.

cesan, it requires, to constitute the crime of treason, that not only the intent should be proved, but the purpose carried into effect.

Crown elective in former times.

The crown of England has been for ages hereditary, and it has been long a settled principle of English law, that on the death of the King his royal dignity descends immediately to his successor. That principle is not now to be controverted. It has been sanctioned by the practice of many centuries, and is become a fundamental maxim of constitutional law. But, in ancient times, the crown was not strictly hereditary, according to the rules of lineal descent, and an interval usually, if not constantly, intervened between the death of a King and the recognition of his successor.

Under the Saxons the crown was elective. The King was usually chosen from a particular family, and when that rule was departed from, civil dissensions not unfrequently ensued. But among the members of the royal family there seems to have been an absolute liberty of choice, as favour, convenience, or accident determined. The son was preferred to the father, the brother to the son, and in one noted instance the line of the younger prevailed over the descendants of the elder brother, though the latter had worn his crown with credit and ability. Illegitimacy was no exclusion.

The Conqueror, after his arrival in London, underwent the form at least of an election. Rufus, Henry I., and Stephen, according to modern notions, were usurpers. They were elected by their partisans, in opposition to

competitors, who claimed, not only by right of inheritance, but, in two of the three cases, by previous treaties and stipulations. Henry II. succeeded to Stephen, not by hereditary right, for in that case his mother would have been Queen, but in virtue of a convention with Stephen, which had been ratified by the chief nobles on both sides.

To prevent such evils as had followed the death of his grandfather, Henry II. had his eldest son not only appointed his successor, but solemnly crowned in his own lifetime. But the younger Henry having died before his father, the succession again became open; and, notwithstanding the instances of Richard, who was next in the line of inheritance, no fresh nomination took place till a few days before the old King's death, when it was too late to have the transaction ratified in England before the throne became actually vacant. Richard, nevertheless, succeeded without opposition; and he is the first King of England who can be said to have ascended the throne without the form at least of an election, and without any interval having elapsed between the death of his predecessor and his own accession. There are public acts in his name, dated in the first year of his reign, before his coronation had taken place[1].

John was an usurper, and obtained the crown by

[1] Fœdera, l. 48, 49. New Edition. Henry II. died on the 6th of July, 1189. Richard was crowned on the 3d of September following.

election. An interregnum of more than seven weeks elapsed between the death of his brother and his own accession. Richard died on the 6th of April. John did not arrive in England till the 25th of May, and his coronation was not performed till the Ascension Sunday following, which fell that year on the 27th of May. In his subsequent acts he dates the commencement of his reign, not from his brother's death, but from his own coronation; and as that ceremony took place on a moveable feast, it happens that, in his public acts, every year of his reign begins on a different day from the preceding one.

At the death of John the kingdom was distracted with civil war. A great part of the nobles and many of the principal cities had sworn fealty to Lewis of France. But the party that had adhered to John, notwithstanding his perfidy and tyranny, recognized his son Henry as his successor. According to an author[1], who lived in the time of Edward III., it was by a formal election, and not without opposition, that Henry was raised to the throne. Be that as it may, it was not till nine days after his father's death that he was crowned; and from the computations of the years and days of his reign by contemporary historians, it appears that this interval was considered as an interregnum, during which the throne was vacant[2].

Henry III. died while his kingdom was in tran-

[1] Hemingford, Gale, ii. 562.

[2] Gale, ii. 38. Matth. Paris, 289. 1009.

quillity. His son Edward was absent from the country. No one contested his title. But so prevalent was still the notion of the English being an elective monarchy, that four days having elapsed between the death of Henry and the recognition of Edward as King, the accession of the latter was dated, not from his father's death, but from his own recognition[1]. Henry died on the 16th of November, and his son was not acknowledged King till the 20th. On that day Henry was buried in Westminster Abbey; and in the absence of Edward, who was still abroad, the nobles present at the funeral took the oath of allegiance to him before his father's grave was closed.

Since the accession of Edward I., there has been no interregnum, unless where the line of succession has been broken; and from the precedents adduced and opinions taken at the accession of James I., it was declared to be the law of England, "that there can be no interregnum "within the same[2]." It is now therefore an established maxim of constitutional law, that immediately on the death of the King the right of the crown is vested in his heir, who commences his reign from that moment[3]. To such an extent has this doctrine been carried, that on the restoration of Charles II. it was resolved by the judges, that from the instant of his father's death, though excluded from the exercise of the kingly office, he was King

[1] Palgrave's Parliamentary Writs, 1st volume, Chronological Abstract, page 1st, note 1st.

[2] Howell's State Trials, ii. 626. [3] Blackstone, i. 196.

both *de jure* and *de facto*; and that, *therefore*, all those who had acted against him and kept him out of possession, in obedience to the powers then in being, were guilty of treason[1]. This extraordinary decision, which subjected almost every man in England, and some of the judges themselves, to be tried and condemned as traitors, was grounded on the narrow principle, that in the interval between the execution of Charles I. and the restoration of his son, no one had assumed the title of King[2]. Had Cromwell, in imitation of Henry VII., picked up the crown from the mire where it was laid, and clapped it on his head, Sir Harry Vane and the others, against whom this act of sanguinary vengeance was directed, would have been secured by statute against the rancorous malevolence of their enemies.

Some disadvantages of hereditary succession.

The advantages of hereditary over elective monarchy are manifold and obvious; but there is one drawback in hereditary succession that cannot be denied. Princes who succeed by hereditary right are apt to confound the office they hold in trust for others with the private estate which a man inherits from his ancestors. Subjects, on the other hand, deceived by the analogies between these two sorts of inheritance, are led to believe that royalty belongs to the King as an estate belongs to its proprietor. From these misapprehensions many inconveniences have arisen. Whatever may be said for hereditary right, no one acquainted with the history of England can deny

[1] Foster, Crown Law, 402. Bacon's Abr. Prærog. A.

[2] Foster, Crown Law, 403.

that cases may occur where it is necessary for the public good to change the order of succession, or even to declare the throne vacant when it is actually full. But on such occasions there is always a party found to resist the alteration on the ground that it is unjust to deprive any one of a possession he enjoys, unless it be under the authority of some positive and pre-existing law. The evil does not stop here. After the change has been effected, the same persons think it their duty to overturn the new settlement and restore the ancient line of princes, on the plausible though fallacious pretext that no misconduct in the possessor of the crown can bar his heirs of their just rights of inheritance. Persons inflamed with these sentiments forget that the crown is not merely a descendible property for the possessor and his heirs, but an office or trust for the benefit of others; that if it has been made hereditary, it is only for the purposes of public utility; and that to make the title to it indefeasible is to defeat the end for the sake of the means [1].

There is, on the other hand, a disposition in Kings to regard as their lawful property the prerogatives exercised by their ancestors; and when abuses in the administration of their government have forced their subjects to curtail their power, they consider it an unjust invasion of their rights. If compelled to yield at the moment, they avail themselves of the first opportunity to recover the authority they have lost; and from their manifest impatience under

[1] Foster, Crown Law, 404—412.

the yoke imposed upon them, they become objects of suspicion to their subjects. It seldom therefore happens that great constitutional reforms can be effected without a change of dynasty. The ancient family, if left on the throne or recalled from exile, are continually on the alert to recover the prerogatives of which, in their opinion, they have been unjustly deprived. Our own history affords the strongest confirmation of these remarks. The deserved though melancholy fate of Charles I. made no salutary impression on his sons. While they reigned, it was their constant struggle to emancipate themselves from the restraints of law, and it was only by a change of dynasty that the constitutional rights of the people were secured. It is a rare fortune, and peculiar to England, that we have a family on the throne who have no legitimate pretensions to the crown but what they derive from parliament. The act of settlement, which is the sole foundation of their title, has cut off all obsolete claims, whether derived from Egbert or from the Conqueror [1].

Style and title of the King in ancient times.

There is another topic, though of minor consequence, that tends also to illustrate the gradual introduction of the monarchical theory of our constitution into the language and public instruments of the government, in opposition to the original notions of royalty entertained by our Saxon forefathers. For many centuries before the union of the Scottish with the English crown, the

[1] Blackstone, i. 217.

title of the King had been that of King of England. In ancient times it was otherwise. During the heptarchy, the petty Kings who ruled over the different tribes of Anglo-Saxons were styled Kings of the West Saxons, Mercians, Northumbrians, Kentishmen, East Angles, East Saxons, or South Saxons; and after the imperfect union of these states under the West Saxons, the title of the predominant prince continued to be taken from his subjects, and not from the territory they inhabited. There are exceptions, indeed, to this rule in some of the Latin charters, which the clergy were left to fabricate in their own way[1]; but Canute, a conqueror, is the first prince that styles himself in his laws King of England. In the preamble to his collection of laws, he is called King of the Danes and Northmen, and of the whole land of the Angles[2]. This territorial designation, however, was dropped by his successors. The Confessor is styled King and Lord of the Angles[3]; and, notwithstanding the continual progress of feudal notions, the Conqueror, his sons, Stephen, and the two first Princes of the house of Plantagenet, continued to use on their great seal the appellation of *Rex Anglorum*, though in the preambles to their charters and other public instruments they sometimes call themselves Kings of England. John was the first prince who had engraved on his great seal the title of *Rex Angliæ;* and in that innovation, which has its origin in the feudal

[1] Heming, 122. Text. Roff. 16. 69, 70, &c.

[2] Wilk. Leg. Anglo-Saxon. 126. [3] Sax. Chron. in 1066.

fiction that the whole soil of England belonged originally to the King, he has been followed by all his successors[1].

ALLEGIANCE.

Allegiance is the tie that binds the subject to the state in return for the protection he receives. In England it is due to the King as representative of the commonwealth. It is distinguished by the English law into natural and local, as it arises from birth, or from temporary residence under the King's protection. In the former case it is held to be perpetual and indefeasible by any act of the subject, due from all men born in the King's dominions immediately on their birth, and incapable of being forfeited, cancelled, or altered by any change of time, place, or circumstances, or by any power short of the legislature[2].

Doctrine of the English law.

It would perhaps be more consonant to reason and natural justice, if a man, on attaining the age of maturity, were enabled by a solemn act to make choice of his country. But if his allegiance is to be altogether independent of his will, there must be some rule to determine the state to which he belongs; and no better criterion can be found than the place of his birth, a fact that in ordinary cases may be ascertained with facility on sure and conclusive evidence. If, however, the principle on which

Some consequences of this doctrine.

[1] Co. Litt. 7. corrected from Sandford and Rymer.

[2] Blackstone, i. 366—370.

this view of the subject depends be carried to extremes, without reserve or limitation, it will be found in some cases productive of unintentional hardship, and in others pregnant with injustice and absurdity. Thus, for instance, the child of English parents, born accidentally out of the King's protection, is by common law an alien, incapable of holding lands in England. This injustice, it is true, has been in part corrected by statute; but another and more barbarous consequence of the common law doctrine of allegiance remains yet to be remedied. The son of a foreigner, born in any part of the King's dominions, or in any country that happens at the time of his birth to be governed in the King's name, is by his birth an English subject; and if taken in arms against the King of England, though it be in the service of his own government, he is liable to be tried and executed as a traitor. A right so repugnant to common sense and humanity has never, it is true, been exercised; but the law, as it stands, leads to the strange anomaly, that the subject of a foreign prince may possess and exercise, if he pleases, all the rights of an Englishman. If born within the King's protection, he is qualified by the accident of his birth to hold lands in England, and to sit in either house of parliament. This strange consequence of the English law of allegiance arises from a principle—just and laudable in ordinary cases, though in this instance misapplied—that nothing but his own demerit can deprive a natural-born subject of his birthright.

Allegiance is founded in reason and in the nature of

government. No state can exist unless those who enjoy its protection are faithful to its interests; and he who seeks admission into its bosom, and accepts its protection, gives virtually an assurance of his fidelity[1]. But though the duty of allegiance be derived from principles of universal application, the degree of obedience due from subjects to the persons intrusted with the government of the state in which they live admits of an infinite variety of shades, and differs in every country according to rules settled by custom or established by law. It is not the same in a tribe of Arabs as in a Turkish camp; it is different at Washington and at St. Petersburg; it has been changed in France by the Revolution; and it has no resemblance at the present day in England to the loose system of subordination that existed before the Conquest.

Measure of allegiance different in different countries.

The doctrines of the English law respecting allegiance, whatever may be the objections to which they are liable, are not now to be disputed. They have been long settled in our courts of law, and are consecrated by time and authority. But it may be curious to inquire by what steps they were introduced, and through what gradations they had passed before they attained their present perfect form.

Obligations of allegiance considered historically.

[1] Qui se cœtui alicui aggregaverant, aut homini hominibusque subjecerant, hi aut expresse promiserant aut ex negotii natura tacite promisisse debent intelligi, secuturos se id quod aut cœtus pars major, aut hi, quibus delata potestas erat, constituissent.—*Grotius de Jure Belli et Pacis. Prolegomena.*

In England, as in the other kingdoms of Europe, the principles that regulate and the laws that enforce the duty of allegiance have been borrowed in part from the Roman empire, and are in part derived from the ancient usages of the Germans. At one period the rigid and strict rules of the empire have prevailed. At other times and in other places the more lax and flexible ties that held together a German community have, in practice at least, and sometimes even in law, predominated. As the one or other system exercised its influence, subjects have rendered an absolute or conditional obedience to their rulers.

Unconditional oath of allegiance borrowed from the Roman empire.

In the republic of Rome, no one could lawfully serve in the army without taking the military oath, which bound him to be faithful and obedient to his general, saving the fidelity he owed to the Roman senate and people. On the destruction of public liberty the same oath was taken to the emperor as commander-in-chief of the army; but the clause in favour of the senate and people was omitted; and instead of being limited to the soldiery, the oath was extended to all magistrates and citizens, and ultimately to the provincials. It was administered at the accession of every emperor, and renewed at stated periods during his reign[1]. When the Kings of the Franks had obtained from Justinian the cession of his rights in Gaul, they were not long in reviving and establishing a practice so favourable to the increase and stability of their power.

[1] Mém. de l'Acad. des Inscript. xxi. 318—322.

As early as 561, on the death of Clotaire I. the last surviving son of Clovis, the inhabitants of Tours were made to take an oath of fidelity to his son Caribert; and when Caribert died, a similar oath was exacted from them to his brother Sigebert. On the death of Sigebert the cities that had been subject to his authority were required to swear fealty to his brother Gontran and to his son Clotaire[1]. The practice may be considered as by that time fully established among the Franks; and in one of the formulas collected by Marculfus[2], the manner of administering the oath is described to us. The count in every district was directed to summon all the inhabitants, Franks, Romans, and others, to meet in the towns, villages, and castles most convenient for them, and there, in presence of the King's envoy, to make them swear fealty to the King on the relics of saints, or in some other form consecrated by religion.

This usage, introduced by the first race of Kings, was continued by the Carlovingians. No one above the age of twelve was exempt from taking the oath of fealty. Ecclesiastics were subject to it as well as laymen, and vassals as well as independent freemen. The words of the oath in the time of Charlemagne were simple and concise. "I promise," said the person to whom it was administered, "to stand by my lord Charles and his sons, "for I am and ever shall be faithful to him all the days "of my life, without fraud or guile." Additions to these words were afterwards made, but without substan-

[1] Dom. Bouquet, ii. 227. 295. 350. [2] L. i. 40.

tially enlarging the obligation they imposed. The subject bound himself to aid the King with his counsel and person, to defend his honour and authority, and never to attempt any thing to his prejudice or to the disturbance of his government[1].

The oath of a Roman soldier to his Emperor had been absolute and unconditional[2]; and when adopted by the Barbarians, and transferred to the new monarchies they erected, it continued in form to have the same character. Some high-minded chiefs appear to have objected to it on that account. A precept of Pepin, King of Italy, informs us there were persons, so late as the eighth century, who refused to take the oath of fealty when required of them[3]. It was probably to vanquish these scruples that an oath in return was exacted from the King to his subjects, by which he bound himself to maintain them in all their rights and privileges, to administer to them justice in mercy, and if from bad advice any errors should have crept into his government, to correct them when pointed out to him[4]. By this engagement the obligations of the prince and people became mutual. If the King violated his oath, the subject was released from the allegiance he had sworn. A capitulary of Charles the Bald gives express permission to his subjects

Coronation oath exacted from Kings.

[1] Théorie des Loix politiques de France, iii. Preuves, 7—20.

[2] Vegetius, Inst. Milit. l. ii. c. 1.

[3] Cap. Pippin. Reg. Ital. in 793, § 36. Baluz. i. 541. Qui per superbiam jurare noluerint.

[4] Baluz. ii. 101.

to assist one another and to confederate against him, in case he infringed their privileges or was guilty of injustice, and refused to amend his errors [1].

Homage derived from the Germans.

With the oath of fidelity borrowed from ancient Rome was conjoined a form of obligation unknown to the Romans. Every member of a German state must have been bound by duty, as well as by regard to self-preservation, to defend the community to which he belonged; and if he betrayed or deserted its interests, he was punished with death [2]. But where there was no permanent chief, there could be no bond to any individual of the nature of allegiance. Obedience was due from soldiers to their general; but in national wars the authority of the general ceased with the return of peace, and in expeditions undertaken by private adventurers it must have ended with the conclusion of the enterprise. There existed, however, one permanent bond of connexion among the Germans, peculiar to that people. Every German chief was surrounded by a band of followers or companions, who had voluntarily attached themselves to his person. These men constituted in peace his pride and ornament, in war his strength and security. They gave him weight at home and consideration abroad. It was the ambition of every chief to excel in the number and valour of his companions. To be received into the train of a distinguished warrior was an honour, and to rise in his service and merit a conspicuous

[1] Capit. Carol. Calv. t. xix. § 10. Baluz. ii. 82.

[2] Tacit. de Mor. Germ. § 12.

place in his esteem was the object of emulation among his followers. In battle it was disgraceful for the chief to be outdone by his companions, and disgraceful for the companions to fall short of their chief. It was their duty to protect and defend his person; and if he fell, it was infamous to survive him (N). Whatever glory they acquired, they attributed to him. He fought for victory, they for their chief. Admiration and affection formed the basis of this connexion, and it was cemented by presents and acts of kindness. The companions feasted at the table of their chief, and received from him arms and horses in reward of their devotion to his service. War and plunder furnished him with the materials for his bounty. If his own tribe languished in peaceful inactivity, he sought some neighbouring state engaged in warfare; and, by the services he rendered and the spoils he gained, he added to his fame as a warrior, and acquired the means of indulging his munificence and gratifying his followers[1].

This singular institution the Germans carried with them into the countries they subdued, and it became the chief bond of political union in the governments they established. Every chief of reputation had a body of warriors devoted to his person. In war they attended him to the field, and in peace they were his guests and companions. The hospitality he afforded them was

[1] Tacit. de Mor. Germ. § 13, 14.

maintained out of the conquered lands that fell to his share; and as the King, from his rank and position in the state, was the great dispenser of the national property, it became the object of every subordinate chief to attach himself to the monarch. Every one solicited admission among the companions of the King, and professed to him the same devotion which from his own immediate followers he had been accustomed to receive. A formula of Marculfus [1] describes to us a chief coming to the palace with his followers, and placing his hands within the King's hands, pledging his troth and swearing fealty to the King; in return for which he was received into the order of Antrustions, or guests of the King, with the privileges attached to that distinction. Charlemagne published a capitulary [2] forbidding any one to refuse lodgings or deny provisions at a reasonable rate to the persons repairing to court on that errand. Homage was the name given to this profession of attachment and devotion to a superior, and it was regarded as the most sacred and intimate connexion that could subsist between one man and another. It was unaccompanied by any oath, but was always followed by an oath of fealty. The inferior was styled the man, homager, or vassal of the other, who was called his lord or seignior. The same individual might be the vassal of one person and the lord

[1] I. 18.

[2] Carol. M. Leg. Langobard. 11. Canciani. i. 150.

of another; and when homage, ceasing to be a mere personal bond of union, came to be connected with land, a man might have as many lords as he had tenements.

To be the companion of a distinguished chief had been honourable among the Germans. To be the man or immediate vassal of the King was both honourable and profitable. The possessor of that privilege was elevated in dignity above ordinary freemen. He had a higher composition for injuries done to him [1]. He was exempt from the jurisdiction of inferior tribunals, and could not be tried except in the King's court [2]. He had means of access to the King, not enjoyed by ordinary freemen; and had thereby opportunities, not only of recommending himself for offices and employments, but of obtaining, under the name of beneficiary lands, a larger portion of the national property for his use. If he owed more than ordinary obedience, and professed more than ordinary devotion to the King, he was entitled to greater protection in return. A condition attended with such advantages had many who aspired to it. Freemen who were not vassals of inferior lords sought to be included among the men or immediate followers of the King; and in time few persons remained who were not immediate

[1] L. Ripuar. t. 7. t. 11. § 1. L. Sal. Ref. t. 43. § 1. 4. 6, 7.; t. 44. § 1, 2. 4.

[2] Formul. Lindenbrog. § 177, apud Baluz. ii. 544. None but the King, says an Anglo-Saxon law, has jurisdiction over a King's thegn. Wilk. Leg. Anglo-Saxon, p. 118.

vassals of the King, or vassals of others who stood directly or remotely in that relation to the monarch.

Respect and reverence were due from the man or vassal to his lord. In other points their obligations were mutual. If the vassal was bound to defend his lord, the lord in return was bound to protect his vassal [1]. It was the want of this protection that diffused the system of vassalage over Europe till it became nearly universal. In the anarchy that followed the conquests of the Barbarians, and their subsequent dispersion over the countries they had subdued, men were compelled to seek that protection from the powerful which they could not obtain from the laws and government [2].

The connexion of a chief with his companions was in its origin voluntary, and in its nature conditional. Founded on compact, and established on the basis of mutual services and obligations, a breach of covenant on either side released the other party from his engagement (O). It was therefore better calculated to serve as the groundwork of a free government, than the servile submission that formed the only relation between the Roman em-

[1] Glanville, l. ix. c. 1. Mutua debet esse dominii et homagii fidelitatis connexio, ita quod quantum homo debet domino ex homagio, tantum illi debet dominus ex dominio, præter solam reverentiam. See also Bracton, l. ii. c. 35. § 2., and Fleta, l. iii. c. 16. § 20.

[2] Montlosier, Monarchie Française, i. 352—361. Hallam, Middle Ages, i. 169. 8vo. Guizot, Essais sur l'Hist. de France, 174.

perors and their subjects. Accordingly, at a very early period after the conquests of the Barbarians, we find homage established as the great bond of connexion between the chief and inferior members of the commonwealth. When Tassilo, duke, as he is called, or general of the Bavarians, submitted to Pepin, King of the Franks, he repaired with the chief men of his nation to that prince, and placing his hands within the hands of Pepin, according to the usage, as we are told, of the Franks, he became his vassal or homager, and afterwards swore fealty to him and his sons on the relics of St. Denis. The oath of fealty annexed to homage is without reserve or limitation; but homage being essentially a conditional obligation, the fealty attached to it was considered as partaking of that quality, so that when the conduct of the superior absolved his man from the tie of homage, the obligation of fealty was held to expire with it.

It was not, however, from the whole body of his people that homage to the King was expected or received. The chief persons of the state and his immediate vassals were required to do him homage. The rest of his subjects took an oath of fealty without homage. This distinction is marked with the greatest clearness in the laws of the Visigoths. On the election of a new King, every one possessed of a palatine office was bound to come into his presence and swear to him fealty according to ancient usage. Inferior persons were convoked in their several districts, and had the oath of fealty administered to them

by the oath-exactor, who was sent into the province for the purpose [1].

It is not my object to follow the relations of chief and retainer in their decline, when, disfigured by selfishness and rapacity, they became a source of discord and instrument of oppression. I may, however, be permitted to remark, with one of the most candid of modern writers, that it is from the connexion of chief and companion we derive all that is noble or generous in the sentiment of disinterested loyalty. Mutual confidence and devoted attachment were essential to that union. Every young man was educated in notions of fidelity to his adopted chief, of respect for his will, and affection for his person; and when changes in the constitution of society led him to regard the King as his natural lord, he insensibly transferred to this state idol the sentiments of generous and elevated devotion, in which he had been nurtured towards the household gods of his ancestors. In the party connexions of free states, when animated by the spirit of some great and distinguished leader, we have another and perhaps a more genuine relic of the temper of mind and character that gave life and vigour to the more ancient institution.

[1] Leg. Visigoth. l. 2. t. 1. l. 7. Many centuries afterwards the same distinction was made by Baldus in a comment on the peace concluded at Constance in 1183: Vasalli tanquam vasalli, et ceteri omnes tanquam subditi, debent jurare fidelitatem principi. Apud Meyer, Espr. de Instit. Judic., i. 190.

In the early part of the Anglo-Saxon history, there is no mention of any general oath of fealty or allegiance being exacted from the people. The oath taken by the King at his coronation implies indeed a corresponding obligation on the part of the subject; and it is not improbable that the persons present on that occasion entered into some formal engagement towards their sovereign. To be faithful to their natural lord is a common topic of exhortation with the Anglo-Saxon clergy in their addresses and homilies to the people; and on the accession of Canute we are told by an ancient author [1], that the great men of the kingdom swore fealty to him, and that in return he swore to be a faithful lord to them according to the laws of God and man. But there is no trace among the Anglo-Saxons, as among the Franks, of a general oath of fealty to the King from all his subjects. It is true that in one of the laws attributed to the Confessor [2] it is said, that all freemen in England were bound to meet once a year in the *folcgemot*, and in presence of the bishops to take an oath of fealty to the King. But there is no allusion to this practice in the chronicles or genuine laws of the Anglo-Saxons; and from the fabulous circumstances blended with the story, it may be set aside as totally unworthy of credit. Whoever was the compiler of that spurious collection of laws, he probably took his account of this supposed regulation from the usages of his own times. For many ages after the Conquest, it

Mutual engagements of Kings with their subjects and of lords with their men among the Anglo-Saxons.

[1] Flor. Wigorn, in 1016. [2] Ll. Confess. 35. Wilkins, 204.

was the custom to assemble in the court leets and sheriffs' tourns, all persons of inferior condition, who had attained the age of twelve, and to exact from them an oath of fealty to the King[1].

The most ancient oath of allegiance, that occurs in any English historian, is to be found among the laws ascribed to King Edmund, who reigned from 940 to 946. "Let every man," says the law, "swear such fealty to "King Edmund as a man owes to his lord, without "strife or disturbance, in sight and in secret, loving what "he loves, rejecting what he rejects[2]." It follows from these words, that the fealty sworn to the King was the same which a man owed to his lord; and that to judge of the nature and extent of the obligation which this oath imposed on the subject, it is necessary to know exactly what was the engagement of the man.

Mably laments[3] that the oath of the Antrustion to

[1] Britton, ch. 29.

[2] Ut omnes jurent in nomine Domini, pro quo sanctum illud sanctum est, fidelitatem Edmundo Regi, *sicut homo debet esse fidelis domino suo,* sine omni controversia et seditione, in manifesto, in occulto, in amando quod amabit, nolendo quod nolet, et antequam juramentum hoc dabitur, ut nemo concelet hoc in fratre vel proximo suo plusquam in extraneo.—Bromton, c. 859. I have not translated the last part of the oath, because I do not understand it. The qualifying clause is taken from the oath to Charlemagne, preserved in the Formul Lindenbrog, § 40, where the person swears fealty, sicut recte debet esse homo domno suo.

[3] Obs. sur l'Hist. de France, l. 3. ch. 3. note 3.

the King is not given by Marculfus; and from the silence of subsequent authors it may be inferred, that the loss is not supplied by any collection of laws or judicial forms extant on the continent. We have been more fortunate in England. The oath of a man to his hlaford is preserved among the Anglo-Saxon laws[1]. It is called the *hyldath* or oath of fealty, and its tenor is as follows. "I "shall be faithful and true to N, and love all that he "loves, and shun all that he shuns, conformably to the "laws of God and man, and never willingly, nor wittingly, by word or deed, do aught that is hateful to "him, on condition that he keep me as I am willing "to earn, and all that fulfil, which was agreed upon "between us, when I submitted to him and chose his will[2]."

[1] Leg. Anglo-Saxon, p. 63.—This oath is preserved in the Textus Roffensis, f. 38 b. Hickes, in his Dissert. Epist. p. 112, refers it to the Dano-Saxon period of the language; but in substance it must be of far greater antiquity, as the connexion it describes existed in the woods of Germany.

[2] Among the Formulæ Sirmondicæ there is one, § 44., entitled, Qui se in alterius potestate commendat, which describes an engagement between an inferior freeman and his lord, similar to the one implied in the hyldath of the Anglo-Saxons; but the terms of the engagement intimate a greater disparity of condition between the parties than appears in the Anglo-Saxon oath, the inferior being represented in a forlorn and destitute condition, and in these circumstances soliciting admission into the service and protection of his lord. That the reader may judge for himself, I subjoin the formula entire.

From these words it is clear, that the engagement of a man with his hlaford was voluntary, inasmuch as it was founded on compact; and conditional on the part of the man, inasmuch as he was released from the engagement he had contracted, in case the hlaford failed in performing his part of the agreement. When exacted from subjects to their King, it ceased to be voluntary, but it continued to be conditional. It was not absolute, unlimited fealty, which the subject swore to the King, but such fealty as a man owed to his lord. If a breach of compact on the part of the hlaford released his man from the engagement he had sworn, it follows, that as far as the oath of fealty was concerned, a breach of compact on the part of the King must equally have released his subjects from their allegiance. What terms or compact the King was understood to have made with his subjects we are

Domino magnifico illo, ego enim ille. Dum et omnibus habetur percognitum qualiter ego minime habeo unde me pascere vel vestire debeam, ideo petii pietati vestræ et mihi decrevit voluntas, ut me in vestrum mundeburdum tradere vel commendare deberem, quod ita et feci, eo videlicet modo, ut me tam de victu quam et de vestimento, juxta quod vobis servire et promereri potuero, adjuvare et consolare debeas, et dum ego in caput advixero, ingenuili ordine tibi servitium vel obsequium impendere debeam, et me de vestra potestate vel mundeburdo tempore vitæ meæ potestatem non habeam subtrahendi, nisi sub vestra potestate vel defensione diebus vitæ meæ debeam permanere. Unde convenit ut si unus ex nobis de his convenientiis se emutare voluerit, solidos tantos pari suo componat et ipsa convenientia firma parmaneat.

not informed. They were probably of a loose, indeterminate nature, and settled by custom rather than regulated by law; but if broken on the part of the King, the subject by the very terms of his oath was released from the fealty he had sworn.

One instance is recorded where stipulations more formal than usual appear to have been made between the King and his people. Ethelred II. had been expelled from his kingdom by the Danes, after giving innumerable proofs of his incapacity and unfitness to reign. On the death of the Danish monarch, who had been raised to the throne in his place, his former subjects, desirous to have again a King of their own nation, sent him word that they would take him back as their King, provided he would govern them better than he had done before. The exiled prince gladly accepted their offer, and assuring them he would be a faithful hlaford to them in future, pledged himself to amend whatever they disliked in his government. On these terms, with mutual promises and stipulations on both sides, he was restored to his kingdom [1].

This is the only instance I have found in Anglo-Saxon history of a formal compact between the King and people. But there are several examples of princes deposed for misgovernment, which implies, that in the opinion of that people, the relation of King and subject was founded on a compact, tacit or expressed, and that a breach of conditions on the side of the King released the subject from his allegiance. In the eighth century a

[1] Saxon Chronicle in 1014.

King of the West Saxons, of the name of Sigebryht, was driven from the throne for his illegal conduct by sentence of his witan[1]. Nearly about the same time the unjust and tyrannical government of Beornred, King of the Mercians, excited a general combination of his subjects, of all ranks and degrees, against him, which led to his deposal and to the election of Offa, a distant relation of the royal family, in his place[2]. Many similar instances might be given; but, without referring to such extreme cases, the general fact is undeniable, that the authority of the Anglo-Saxon Kings over their subjects was precarious, weak, and ill defined. An author, who lived under the Conqueror, mentions the unbridled ferocity of the northern and western parts of England, where the people under their ancient Kings had prided themselves on rendering no greater obedience to the laws than was agreeable to themselves[3].

There is another observation to be made on the Anglo-Saxon oath of a man to his hlaford. It contains no reservation of fealty or obedience to the King; and the question naturally occurs, what was the duty of a man, who had contracted that obligation, when a quarrel

[1] Saxon Chronicle in 755. [2] Westm. in 758.

[3] Orderic. Vital. l. 4. apud Maseres, 209. Speaking of the state of England soon after the Conquest, he observes, Circa terminos regni, occidentalem vel plagam septentrionalem versus, effrænis adhuc ferocia superbiebat; et Angliæ regi, nisi ad libitum suum, famulari, sub rege Edwardo aliisque prioribus, olim despexerat.

arose between the King and his immediate lord. There is no provision in the oath for this contingency, and no clear indication from history what was considered to be the duty of the man in such an event. In the account given by the Saxon chronicle of the civil war between the Confessor and Earl Godwin, there are some obscure intimations that the thegns of the latter were bound to maintain the quarrel of their immediate lord till released from the engagement they had contracted with him; but the facts are not stated with such precision as to enable us to draw any certain conclusion from them[1]. When such cases occurred, and in those remote times they were not unfrequent, it is probable that in England, as on the continent, the men ranged themselves on one side or the other, as interest, fear, or affection dictated.

Changes effected by the Conqueror.

The law of England appears to have continued in this respect in the same unsettled state till the Norman conquest was completely established. The Conqueror was not a prince to content himself with the qualified obedience that had satisfied the Anglo-Saxon Kings. At the very outset of his reign he gave a sample of the different spirit of his government in his conduct towards the inhabitants of Exeter. Having intelligence that they were preparing to take up arms against him, he sent to the principal citizens and ordered them to take the oath of fealty. They declined, and refused even to admit him within their walls, but offered to pay him the customary tribute due from their town. He replied, that it was not

[1] Sax. Chron. in 1051.

his fashion to have subjects on such terms, and marching against them, he compelled them, after a slight resistance, to surrender at discretion[1]. The same character is visible in all the other acts of his reign. One of his laws obliges every freeman in his dominions to take an oath of fealty to his person without reserve or qualification[2]; and in the latter part of his life, he assembled all the landholders of any account throughout England, whose men soever they were, and compelled them to become his men, and to swear fealty to him against all persons whatever without any exception[3].

This was an important step in the system of feudal subordination. Charlemagne had enacted, that no person should take an oath of fealty to any one except to the King and to his own lord; but he had placed the King and private lord on the same footing, and in the event of any difference between them, he had not ventured to declare, that the obligations of the vassal must give way to the duty of the subject[4]. So late, indeed, as the time of St. Lewis, the vassals of a mesne lord in France were in certain cases bound by law to serve their lord against the King[5]. In Italy, after an interval of seventy years, the example of the Conqueror was followed by Frederick Barbarossa. In a diet held by that prince at Roncaglia, soon after his short-lived triumph over the Lombard

[1] Orderic. Vital. lib. 4. apud Maseres, 210.

[2] Leg. Gulielm. 52. apud Wilkins. [3] Saxon Chronicle in 1086.

[4] Capit. 2. in 805. § 9.

[5] Etablissemens de St. Louis, ch. 49. Montlosier, 1. 434.

republics, it was enacted by his authority, that in every oath of fealty from a vassal to his lord, the Emperor should be excepted by name[1]. In England, when Glanville wrote, it was an established principle of law, that in every oath of fealty to a subject the tenant was to except the fealty he owed to the King and to his heirs[2].

This innovation led to the distinction of liege homage and fealty, from simple, feudal, or predial homage and fealty[3]. Liege homage, from which comes the word allegiance, was due to the King as sovereign lord of the state, and had no relation to tenure[4]. Simple homage, though originally a personal engagement, was in latter times, in England at least, necessarily connected with some fief, no one in this country being permitted to do homage to a subject for vassalage alone, without some tenement or service[5]. It was some time, however, before the term liege-homage was restricted by English lawyers to the homage rendered by a subject to the King. So late as the reign of Edward I., the words liege lord and liegeance were used to express feudal relations between subjects. He was said to be liege lord, from whom the tenant held his principal messuage or tenement, or to whom he had made his first profession of homage[6].

[1] Muratori. Script. Ital. vi. 789. [2] Glanville, l. 9. c. 1.

[3] Spelman's Remains, 36. Hale, P. C. 65. 70.

[4] Spelman's Glossary, Homagium.

[5] Glanville, l. 9. c. 2. Bracton, l. 2. c. 35. § 6. Nec pro solo dominio fit homagium, nisi soli regi vel principi, sine tenemento vel servitio.

[6] Glanville, l. 9. c. 1. Bracton, l. 2. c. 35 and 37. Fleta, l. 3. c. 16. § 16. Britton, ch. 68.

The oath required by the Conqueror from his subjects, though tinged with feudal expressions, seems to have been an absolute, unconditional engagement of service and fealty against all the enemies of his crown and kingdom. But, while the feudal system was in vigour, there can be little doubt that in England as in France, the obligation was considered to be conditional, and liable to be cancelled by the injustice or misgovernment of the King. In France we are told, that the faith and homage rendered to Philip Augustus contained a promise of fealty so long only as the King did justice in his court. St. Lewis admits the legality of private war against the King who denies justice to his subject; and if any near vassal refused to serve his lord in the prosecution of the quarrel, he declares the fee of the vassal legally forfeited to his lord[1]. Similar notions, though not admitted into our law books, prevailed about the same period, in a less degree, in England.

Diffidation.

When two persons, whether King and subject or two subjects, were living in amity, and connected by any tie that implied mutual faith and confidence, it was reckoned traitorous for either party to commit a hostile or violent act against the other, without giving him due notice of the intended aggression. This notice was called *diffidatio*, which is usually translated defiance, though, properly speaking, it means to undo, break off, renounce or withdraw the faith or protection due or promised to another. If two barons, two knights, or even two burghers,

[1] Montlosier, Monarchie Française, i. 434. Etablissemens de Saint Louis, l. 1. ch. 49.

who had the right of private war, were living in peace and security with respect to each other, it was not lawful for the one to attack or use violence against the other without a regular notification of his purpose[1]. Innumerable regulations on this subject are to be found in the laws and institutions of the continent; and neither the name nor practice of diffidation were unknown in England.

William of Malmsbury censures Stephen for attacking by surprise the Earl of Chester and his brother, because he had parted from them in friendship some time before, and had not previously, according to ancient usage, put them out of his protection, or, as it is called, defied him[2]. Philip Augustus, before he received the homage of Arthur, Duke of Brittany, declared John, King of England, out of his faith and protection as a vassal of France[3]. Henry III. began hostilities against William, earl marischal, by sending him a formal diffidation through the bishop of St. Asaph; and when the earl was afterwards solicited to submit himself to the King's mercy, he justified his refusal on the ground that the King had, without trial by his peers, declared him out of his royal protection, and made war on him as a public enemy. "I am no traitor," says the earl; "the

[1] Ducange. Gloss. Diffidare, Diffiduciare. Diffidare proprie est a fide quam quis alicui debet aut pollicitus est, per literas aut epistolam deficere. Item, declarare aliquem a fide, quam debebat, defecisse. Ib. Supp. Vel inter dominum et vasallum, vel inter affidatos. Spelman. Gloss.

[2] Malmsb. Hist. Novell. lib. 2. f. 105. b. quod diffidiare dicunt.

[3] Spelman. Gloss. Diffidatio.

" King has, without judgment of my peers, deprived me " of my honours and laid waste my lands; twice he has " put me out of his protection [1], while I demanded and " was ready to abide by the judgment of my peers in " his court. I am no longer his man, and by his own " act have been absolved from the homage I had rendered " him. It is therefore lawful for me to defend myself, " and to resist the evil counsellors that surround him by " all the means in my power [2]."

The same reign affords another illustration of this usage. Before the battle of Lewes the confederate barons sent a message to the king, professing fealty and obedience to him, but complaining of those about him, who they said were as much his enemies as theirs. The King in reply took part with his friends, declaring all persons, who were enemies to them, out of his protection; and the barons of his party, retorting the taunts of their adversaries, gave the lie to their accusations, and renounced all alliance of faith and amity with them. Having received these letters of diffidation from the King and his partizans, the confederates prepared for battle [3].

[1] Semel et iterum me diffidavit; cum semper paratus essem in curia sua juri parere, et stare judicio parium meorum. Unde homo suus non fui; sed ab ipsius homagio, non per me, sed per ipsum, licenter absolvebar.

[2] Matt. Paris, 388—38.

[3] Ib. 994. The King's reply to the barons is called litera diffiduciationis. The expression he uses, when praising his friends, is eorum inimicos diffidamus. The barons of his

A still more remarkable act of diffidation is one that took place at the deposal of Edward II. Without entering into the justice or necessity of that measure, the mode of conducting it deserves notice as illustrative of the opinions entertained in that age with respect to the mutual relations of King and subject. While Edward was still King, Sir William Trussell appeared before him as proxy for the lords spiritual and temporal and others, and in their name, and in virtue of the full and sufficient powers with which they had invested him, he renounced and withdrew the homage and fealty appertaining to Edward as King of England, from his constituents, declaring them free and quit from such homage and fealty in time to come, in the best manner that law and custom warranted, protesting that thenceforward they were not to be deemed in his fealty or allegiance, or to hold any thing from him as King, but were to consider him as a private person altogether divested of royal dignity[1]. From this proceeding, however questionable in other respects, it appears that according to the notions of that time the subject had a right, for good and sufficient reasons, to renounce his homage and fealty to the King, in the same manner as the King had for similar reasons a right to put the subject out of his faith and protection. Deposal of Edward II.,

The same forms were observed at the deposal of and of Richard II.

party consider themselves diffidatos by the confederates, and in return treat them tanquam hostes publicos a hostibus diffidatos.

[1] Knyghton, 2550.

Richard II. with this difference, that before the subjects of that prince renounced their allegiance by a formal and public act, he had abdicated the government and absolved his lieges from the homage and fealty they had sworn to him (P).

There is still preserved in the law of England a remnant of this ancient right. If an alien enemy, who has the benefit of the King's protection, compasses the King's death, he is guilty of treason. But if he publicly renounces the King's protection, he is to be dealt with, say the lawyers, as an enemy; a proceeding, observes Sir Matthew Hale, that has some analogy to what was anciently called *diffidatio* or defiance[1].

While Normandy and other transmarine possessions were attached to the crown of England, persons who had estates on both sides of the channel must frequently have been placed in situations where they were compelled to exercise the right of diffidation. The same must have happened while England and Scotland were in general habits of amity, interrupted occasionally by temporary hostilities. At the battle of the Standard we are told that Robert de Brus, a Norman baron, who had estates in Scotland, thought it necessary, before the action commenced, to renounce his homage and fealty to the Scottish crown. But with the loss of Normandy and adjacent provinces of France, and with the cessation of all friendly intercourse with Scotland, this necessity was at an end;

[1] Hale, P. C. 60, 92.

and, when the practice fell into disuse, the right appears in the case of individuals to have been extinguished, though in the instances just quoted it continued to be exerted on the part of the public. The great men had not in England, as in Spain, a right to renounce their country on the ground of some personal offence; nor having made that renunciation, could they lawfully enter into the service of a foreign prince and assist him in making war on their native land. This singular privilege, which was called *desnaturalizarse*, appears to have been frequently exercised by the Spanish nobles, and to have been not only sanctioned by law, but subjected to various minute regulations, on the due performance of which its legality depended. If any great man, who thought himself aggrieved, was desirous to renounce his country with all the rights, privileges, and obligations of a natural-born subject, he was bound in the first instance to renounce his vassalage and allegiance, and give back to the King all the lands and castles he held from the crown. He was then to demand the term allowed him by law to quit the country, with as many of his followers and adherents as chose to accompany him. In his route to the frontiers he was entitled to have provisions for himself and his companions on making payment for them, and in return he was bound to commit no devastations in the district through which he passed. He might afterwards enter into the service of a foreign prince, and under certain retrictions, engage in hostilities against his country,

Right of the ricos omes in Spain to renounce their country.

without incurring the imputation of having failed in his allegiance to his natural lord (Q).

This privilege of the *Ricos omes* in Spain was favoured by the division of that peninsula into a number of independent states; and, with many other peculiarities in the Spanish constitution, it had most probably its origin in the loose connexion between the petty princes of that country and the private adventurers, by whose assistance it was recovered from the Moors. Many of these adventurers were foreigners, who owed no natural allegiance to Spain; and, though actuated by the same spirit that led other crusaders to the Holy Land, it was customary for them, before lending their aid against the infidels, to make a bargain for themselves and followers with the prince under whom they were to serve, reserving in the territories they might subdue greater privileges and immunities than were possessed by persons of the same rank in other parts. But though England was gained by conquest, and gradually reduced to subjection by William and his followers, the latter obtained no such privileges from their chief. It appears indeed from the celebrated answer of Earl Warenne[1] to the commission of quo warranto issued by Edward I., that a vague notion was prevalent among the descendants of the first conquerors, that they held their lands and possessions in England by the same tenure as the King held his crown. No pretension, however, was made of any right to quit

[1] Rapin, Hume, &c.

his service, when they pleased, and transfer their allegiance to another prince.

But, though the maxim—nemo potest exuere patriam —which, according to Foster, comprehends the whole doctrine of natural allegiance, is held in the law of England to have no exception, and the violation of it to admit of no excuse, a question has arisen, to whom is that inalienable allegiance due? We are told, that it is due to the person of the King[1]; and, as the King in his politic or ideal capacity constitutes the state, there can be no doubt of the general truth and correctness of this proposition. But the King has a natural as well as a politic capacity, and both are united in the same person. If the King, in his natural capacity, should act in opposition to the duties he owes in his politic capacity, it may be asked, does the allegiance to his person remain indefeasible? If it does, what becomes of the doctrine maintained by one of the highest of our law authorities, "that "resistance to the person of the King is justifiable, when "the being of the state is endangered and the public "voice proclaims such resistance necessary[2]?" If it does not, it cannot be true, that, in all cases, allegiance to the person of the King is indefeasible and inalienable.

Question, whether allegiance is due to the King in his natural or in his politic capacity.

The question whether the allegiance due to the King be applicable to him solely in his regal and political capacity, has been frequently stirred in former times, and the most contradictory answers to it have been given.

[1] Blackstone, i. 371.

[2] Ibid. i. 251.

Judgment against the Despensers.

It was one of the charges against the Despensers, the favourites of Edward II., that they had drawn up and promulgated a bill or paper, wherein they maintained, that homage and allegiance had more regard to the crown than to the person of the King, and bound the subject more to his crown than to his person; from which they inferred, that if the King was not guided by reason in his administration of the kingdom, it was the duty of his lieges, if they kept their oath to the crown, to bring him back to reason, and even to employ force, if necessary, to redress the errors of his government; for, if he is bound by his oath to govern his people and his lieges, his lieges are equally bound by their oath to govern in aid of him and in default of him[1].

For these and other offences the Despensers were banished and their estates confiscated. It is singular enough, that the act against them was obtained by persons who were at that very time in arms against the King; that it was repealed as soon as he had recovered his authority; and that it was renewed in the first parliament of his son, immediately after the doctrine it condemned had been practically enforced by the deposal of the King and formal renunciation on the part of his subjects of the faith and allegiance they had sworn to him.

The renewal of the act against the Despensers, "in "all its points according to the tenor of every article "contained therein[2]," seems to establish as the deliberate

[1] Statutes at large, i. 182. folio.

[2] 1 Edw. III. c. 2.

opinion of the legislature, that allegiance is due to the person of the King generally, and not merely to his crown or politic capacity, so as to be released and discharged by his misgovernment of the kingdom. But, notwithstanding this parliamentary recognition of the law, the depositions of Edward II. and of Richard II. were formidable precedents the other way, and though effected by force, as every measure of the kind must be, they were conducted with all the forms and solemnities of a judicial proceeding. It was probably in consequence of this inconsistency between the act of Edward III. and the determinations of parliament on these important occasions, that when the question was again started, whether allegiance was due to the King in his politic or in his natural capacity, the opinion of lawyers was divided on the subject.

Opinions in the case of the postnati.

Soon after the accession of James I. to the English throne a question arose, whether his subjects born in Scotland after that event were entitled to the privileges of natural-born Englishmen. When the case was argued before the House of Lords, it was maintained by Doddridge, solicitor-general, and by Hyde, Brook, Crewe, and Headley, professors of the common law, " that ligeance is tyed to the kingdome and not to the person of " the King," the very doctrine asserted by the Despensers. It was held on the other hand by Chief Justice Popham, Sir Edward Coke, and Chief Baron Fleming, that allegiance is " tyed to the body natural of the King and not to his body politick," and to this latter opinion all the judges, save one, gave their assent. The case was

afterwards tried in the Exchequer chamber, and decided in favour of the postnati[1]. The decision was conformable to the judgment against the Despensers, but the differences of opinion on the subject show, that the constitutional point it involved was not considered as having been at that time thoroughly settled.

Some of the arguments urged on this occasion afford a curious illustration of the points of view from which professional lawyers are apt to consider constitutional questions. Ligeance, it was said, must be due to the natural body of the King, for indictments of treason charge the accused with having, contrary to their duty of allegiance, compassed the death of the King, which cannot be understood of his politic body, because his politic body is immortal. Every subject, it was argued, is presumed to have sworn fealty to the King, which must be to his natural person, for in his politic person he is invisible, and being invisible he can receive neither homage nor fealty. The coronation oath, it was added, which he takes at his accession, cannot be administered to him in his politic capacity, for in his politic capacity he never dies, and can never therefore begin to reign[2]. Such were the weighty reasons advanced by the first lawyers of England to convince the hereditary counsellors of the crown, that allegiance is due to the King in his natural as well as in his politic capacity.

[1] Howell's State Trials, ii. 566—570. Journals of the House of Lords, 24th Feb. 160$\frac{8}{9}$.

[2] Howell's State Trials, ii. 624.

Within a few years after this decision the question was in substance revived between Charles I. and his parliament. It was maintained by the two houses of parliament, and could not be denied by their opponents, that though the King is the fountain of justice and protection, particular acts of justice and protection are not exercised by him in his own person, nor depend on his pleasure, but are exercised by his courts and ministers, who must do their duty therein, though the King in his own person should forbid them; and such acts and judgments, it was said, are considered the King's acts and judgments, though done against his will and personal command. To this doctrine, unexceptionable as far as it relates to the courts of law, it was added, that the high court of parliament, meaning by that court the lords and commons, is not only a high court of judicature, with control over grants and patents of the King which they may deem prejudicial to the public, but a council to provide for the necessities, to prevent the imminent dangers and preserve the public peace and safety of the kingdom, and *to declare the King's pleasure in those things that are requisite thereunto;* and that what they do therein, hath the stamp of royal authority, although His Majesty, seduced by evil counsel, do in his own person oppose or interrupt the same, the King's supreme and royal pleasure being exercised and declared in that court after a more eminent and obligatory manner than it can be done by any personal act or resolution of his own[1].

Declaration of parliament in 1642.

[1] Declaration of the Lords and Commons in Parliament, Rushworth, iv.

By this memorable declaration, which was the groundwork of all the subsequent proceedings of the parliament in the civil wars that ensued, it is obvious that the two houses not only separated the politic from the natural capacity of the King, but transferred to themselves the sovereign authority attributed to him by lawyers in his ideal character. They assumed to themselves the supreme power of the state, retaining nothing of monarchy but the name. What they accomplished was the reverse of what had been attempted by lawyers and churchmen, when they bestowed on the Kings of the Barbarians all the rights and pretensions of the Roman Emperors. In the one case despotism was established under a semblance of law; in the other, a republic was constituted in fact.

It is curious to observe how, on this occasion, the subtleties of the prerogative lawyers were retorted against themselves. The customary oath of allegiance to the King having been continued to the period of his death, it was contended by the attorney-general of the Commonwealth, in the trial of Duke Hamilton, that this allegiance was due to him in his natural only in consequence of its union with his politic capacity, and so long as they were thus united; and when separated, that it followed his politic capacity as the more worthy, and though nominally sworn to his person, was in sound construction of law an obligation to his kingdom [1].

551. Commons' Journals, 5th and 6th June, 1642. Lords' Journal, 6th June.

[1] Howell's State Trials, iv. 1173.

At the Restoration, as was naturally to be expected, these pretensions of the two houses were abrogated and annulled; and the current setting strongly in the opposite direction, laws were passed and declarations enforced, which, if acted on literally, must have converted our limited government into an absolute monarchy. All persons, bound to take the oath of allegiance, were made to swear, that it is not lawful *on any pretence whatever* to take up arms against the King, and were called upon to renounce with abhorrence the traitorous position, that arms may be taken by his authority against his person or against those who are commissioned by him [1].

Oaths and declarations exacted after the Restoration.

This was the day of triumph for the monarchical theory, which had never before obtained a parliamentary sanction for its extravagances. But in a few years the Revolution followed, and demonstrated the futility of oaths and declarations as securities to a King of England in his endeavours to subvert the fundamental laws of the kingdom. To have retained as part of the oath of allegiance a declaration, in direct violation of which the kingdom had been rescued from arbitrary power, and the nation restored to its ancient rights and liberties, would have been preposterous and indecorous. The declaration required by the militia act and act of uniformity was accordingly abrogated by the first parliament of William

Abrogated after the Revolution.

[1] These declarations were required by the Corporation Act, 13 Ca. II. st. 2. c. 1. § 5. 12; by the Militia Act, 13 and 14 Ca. II. c. 2. § 18, 19; and by the Act of Uniformity, 13 and 14 Ca. II. c. 4. § 9.

and Mary [1]. By some oversight it was left in force under the Corporation Act, and was not finally expunged from our statute book till the accession of the house of Brunswick [2].

By the repeal of the declaration required in the statutes of Charles II., allegiance to the King was placed on the footing in which it had been left by the judges in the time of James I., amended and corrected by the principles acted on at the Revolution. It is due, as has been observed, by every natural-born subject to the person of the King, and cannot be forfeited, cancelled, or altered but by an act of the legislature. No one born in any part of the King's dominions, and within his protection, can by any act of his own renounce his allegiance [3]. But notwithstanding this unqualified language of our law books, when treating in general terms of allegiance, we are told by the same high authorities, that circumstances may arise, where the King, by inference from his conduct, shall be held to have abdicated his throne and absolved his subjects from their allegiance, and that "resistance to his person is justifiable, when, "by his misgovernment of the kingdom, the existence "of the state is endangered and the public safety pro- "claims such resistance necessary [4]." It becomes us not to state by anticipation what conjunction of circumstances would justify the exercise of this right, or authorise the

Opinion of Blackstone on the right of resistance.

[1] 1 W. & M. Sess. 1. c. 8. § 11.
[2] 5 Geo. 1. c. 6. § 2.
[3] Bacon's Abridgment. Prærogative C. 1.
[4] Blackstone, i. 245. 251.

conclusion, that a King in possession has abdicated his crown, and that the throne is thereby become vacant. In the words of a learned judge we must leave "to future "generations, whenever necessity and the safety of the "whole shall require it, the exertion of those inherent "(though latent) powers of society, which no climate, "no time, no constitution, no contract, can ever destroy "or diminish [1]."

States where resistance has been authorised by law.

Notwithstanding the zeal and success with which the monarchical theory was diffused over Europe by lawyers and churchmen, there have been states where resistance to the King was, in certain cases, sanctioned by law. In Castille, if the King attempted aught to his own dishonour, or the prejudice of his kingdom, his subjects were entitled and even required by law to resist his will, and remove evil counsellors from his person [2]. In Aragon the nobles enjoyed what was called the privilege of union, by virtue of which they were entitled to confederate against the crown, where any attempt was made by the King to invade or encroach on their liberties. The union was a legal and constitutional association, authorized and regulated by law. It issued its mandates, as a corporation, under a common seal, and could make war on the King without exposing its members to the penalties of treason or rebellion [3]. In England we have one solitary instance of a similar insti-

[1] Blackstone, i. 245. 251.

[2] Partidas, part. 2. t. 13. l. 25.

[3] Robertson's Introd. to Charles V. note 32d. Hallam's Middle Ages, ii. 68. 8vo.

tution. By one of the provisions contained in the Magna Charta of King John, twenty-five barons were to be elected, whose duty it was to take care that the liberties granted by that monarch were observed. If any infringement of those liberties took place, or if any injustice or oppression was committed by the King or his servants, any four of these barons might remonstrate to the King, or in his absence to the justiciary, and if redress was not obtained within forty days, the whole twenty-five, or a majority of them, were empowered to make war on the King till relief was given to their satisfaction. All persons were bound to assist this commission of twenty-five in the discharge of their duty, and the only limit to their hostilities was not to touch the persons of the King and Queen or their issue[1]. This guarantee of our national liberties, which the cruel and perfidious character of John had probably suggested, was omitted in the charter of his son, and therefore forms no part of the Magna Charta of our statute book.

JUDICIAL POWER.

Said to emanate from the King.

Justice is said to emanate from the King. All jurisdiction is exercised in his name, and all subordinate magistrates derive their authority from his commission. No action can be raised against him. No one can summon him to appear in a court of justice. Every breach of the peace is a transgression against the King. He

[1] Fœdera, i. 132.

alone can prosecute criminals; and when sentence is passed upon them, he alone can remit the punishment awarded to their guilt. No person can pursue his rights in a court of law without the King's writ; and no one must presume of his own authority to exact vengeance from those who have wronged him.

These prerogatives follow naturally from the attributes ascribed to the King in his ideal capacity; but though necessary consequences of that theory, it was some time before the finesse and subtilty of lawyers were able to transfer to the real King all the rights and privileges with which they had invested him in his ideal character (R).

Judicial power among the ancient Germans.

Among the ancient Germans, from whom our Anglo-Saxon forefathers were descended, there were courts of justice before there were Kings. Capital offences were tried in assemblies of the whole nation. Inferior causes were decided in the places where the contention arose. In every district there was a court of justice, consisting of a chief or president, assisted by all the freemen of the district, or by a certain number selected for the purpose [1]. The freemen decided on the merits of the case brought before them: the chief maintained order, assisted the freemen in their deliberations, and after collecting their opinions, pronounced sentence and saw it carried into execution [2].

[1] Tacitus de Mor. Germ. § 12.

[2] Savigny, I. 171. 179. 198—206. 236—238. Mayer, Instit. Judic. i. 381—395. Theorie des Loix polit. en France, viii. 77—83. Preuves, 25. Bouquet, Droit public de France, 135—165.

There seems to have been no appeal from these tribunals. Every court was supreme as far as its competence went [1].

Changes after their establishment in the empire.

After the conquests of the Barbarians and the establishment of royalty among them, considerable changes were introduced in their judiciary system. The King became president of the general assembly of the nation; and when the dispersion of the people over an extensive territory made it inconvenient to collect the whole body of freemen in the same place, ordinary business came gradually to be transacted in a select council of chiefs, of which he was the head. A gradation of tribunals was also established with different degrees of competence; and, in imitation of the Roman law, appeals were introduced to the King's court from the inferior judicatories (S).

The delegation of authority for particular purposes was a notion familiar to the ancient Germans. Matters of small importance were settled by their chiefs. Affairs of greater magnitude were discussed among the chiefs, and then submitted for decision to the people [2]. When the Salic Franks determined to reduce their ancient customs to writing, they selected four of their rulers to collect, digest, and promulgate them [3]. The earliest laws of the Anglo-Saxons appear to have been a selection of precedents or decisions of their courts of law, revised, confirmed, and committed to writing by the chiefs or elders

[1] Montesquieu, Esp. des Loix, l. 28. ch. 28.—The remarks of Montesquieu apply to the administration of justice in France under the second race, but they are equally true of anterior times.

[2] Tacit. de Mor. Germ. § 11. [3] Pact. Leg. Salic. Antiq. Prolog.

of the people, in the presence and with the assistance of the King[1]. Every chief among the Germans had a hundred companions or assessors, to assist him with their advice, and support him by their authority in the distribution of justice within his district[2]. When it was found inconvenient to assemble on every trifling occasion all the freemen of the district for the adjustment of differences and administration of justice in their local courts, a plan was adopted by the Franks of nominating a select number of persons, called Scabini, who were bound to attend for the others, without however depriving them of their rights, or preventing them from resuming at pleasure their judicial functions[3]. A similar institution, though little noticed by historians, is to be found among the Anglo-Saxons. In every *byrig* and hundred, a certain number of *witan* were appointed, who were to witness every transaction, and were thereby qualified to judge and decide in every question of property that arose within their district[4].

[1] Prologues to the Laws of Hlothære and Eadric, Wihtred, Ine, and Ælfred.

[2] Tacitus de Mor. German. § 12. [3] Savigny, i. 172. 217—231.

[4] The fullest account of these elected witnesses is to be found in the supplement to the laws of Edgar, Wilkins, p. 80, 81. They are also mentioned in Ll. Edward V., and frequently alluded to in other places, particularly in the laws of Athelstan. The connexion between the qualifications required by the Germanic nations for a witness, and those demanded by their laws to enable a freeman to sit and vote in a court of justice, has been pointed out by Savigny (i. 228. 240), and illustrated from the capitularies.

Accustomed as the Germanic nations were to the delegation of authority, it is not extraordinary that, when spread over an extensive territory, they intrusted or resigned to a few the power, which had been formerly exercised by the whole body of the people. They were improvident enough to believe, that the authority they gave they could resume at pleasure. They had not yet learned from experience how easily delegated power, granted for a temporary purpose, slides imperceptibly into perpetual, irrevocable, and unlimited dominion.

Judicial power among the Anglo-Saxons.

Soon after the Anglo-Saxons were established in England they substituted permanent Kings for the temporary leaders that had formerly conducted their armies. The Kings thus appointed appear at a very early period to have had a court or council, in which they presided, for administering justice and ratifying civil transactions between their subjects[1]. Penalties were assigned to them as protectors of the peace and guardians of the laws. The tribunal of the King was the supreme court of judicature, but no one could apply to it for redress till he had been refused justice at home in the hundred and shire to which he belonged[2]. The chiefs, who continued to preside in the inferior tribunals, were styled the King's ealdermen, gerefan, and thegns, and in the contemplation of law, they were held to derive their jurisdiction from him. They still, however, retained some vestiges of their an-

[1] Ll. Hloth. et Eadr. 7. 16. Heming, Text. Roffens, see passim.

[2] Ll. Athelst. 3. Edg. p. 2. Cnut. p. 16. Gul. 41.

cient independence. They required no writ from the King for their proceedings[1]. When any affair within the competence of their court was brought before them, they cited the parties to appear, and took cognizance of the case, as they would have done before royalty was established.

Kings assisted in person in the administration of justice.

When an application was made to the King for redress, he either presided in his own court at the trial[2], or sent his signet to some other tribunal[3] with directions to hear and decide the cause. It was not till long after the conquest that the Kings of England ceased, occasionally at least, to attend and take part in the proceedings of their courts of law. In the time of Henry II. the King used to assist in the administration of justice both in the curia regis and in the exchequer[4]. Henry III. is mentioned as having repeatedly sat in Westminster Hall with his judges; and, on one occasion, when a verdict had been given against him, and the opposite party demanded judgment, he withdrew his suit in open court[5]. We are told that Edward IV. sat in the King's Bench for three days together, in order to see how his laws were executed; but it is not said that he interfered with the proceedings of the court[6]. It is reported of James I. that he also sat there in person, but that he was told by his judges he could not deliver an

[1] Hickes, Diss. Epist. 2. 8. 48. [2] Ibid. 114. [3] Ibid. 5. 43.
[4] Dialog. de Scacc. l. i. c. 4.
[5] Madox, Exchequer, ch. 3. § 6; ch. 20. § 6.
[6] Stow's Chronicle, p. 416. Edition of 1631.

opinion[1]. It is now an undisputed principle, that, though the King should be present in a court of justice, he is not empowered to determine any cause or motion but by the mouth of his judges, to whom he has committed his whole judicial authority.

Kings could be sued in the courts of justice formerly;

It is a remarkable fact that the same reign, which, for the last time, exhibited a King of England interposing in his own person in the administration of justice, should also be the last, during which he could be sued like a subject in the courts of law. When he ceased to be amenable, like other magistrates, to civil process in the ordinary course of law, he ceased to exercise in person his judicial functions. The ideal King has continued to be the source of justice; but since the reign of Henry III. his visible representative on earth has been unable to disturb the fountain or to divert the stream from its proper channel, except through the agency of his judges.

The ideal King of the law has no superior; he is amenable to no tribunal, and responsible to none but God for his actions. If these attributes had been conveyed entire and without qualification to the real King, he must have been absolute master of the lives and properties of his subjects. But, though stated in law-books to be rights inherent in royalty, they are, in practice, subject to limitations and abatements that render them, if not completely innoxious, at least comparatively harmless.

[1] Blackstone, iii. 41.

The King of England cannot be sued in a court of law; but if any one has a demand upon him in point of property, the plaintiff has only to petition him for redress in his Courts of Chancery or Exchequer, and on having the attorney-general's fiat, which ought to be given of course, he will have justice administered to him with as much certainty and despatch as if he had brought an action against a subject. The plaintiff indeed will be told, that he receives justice from the King as a matter of grace and not on compulsion, and he must pray for it and accept it on these terms[1]. But while the favour he receives is one that cannot be withheld from him, it is to all essential purposes a right; and the mode of obtaining it can be considered as nothing more than an unmeaning compliment to the legal fiction it disregards and eludes.

but cannot now.

The rule that the King of England cannot be sued in a court of law, is founded on his sovereign and transcendent, that is, on his ideal attributes. No suit, say the lawyers, can be brought against him, because no court can have jurisdiction over him. "Who," exclaims Finch, in a burst of loyalty, "shall command the King[2]?" If this reasoning be just, and it seems unanswerable—if it be the want of a coercive jurisdiction over the King that makes it impossible for any suit or action to be brought against him; it follows, that while he was liable to actions like a common person, there must have been some

Conclusions from this fact.

[1] Blackstone, i. 243; iii. 255. [2] Ib. i. 242.

authority in the state, that possessed, or was supposed to possess a legal control over his conduct. It cannot be supposed, that, while the law permitted him to be sued, it held that judgment, if given against him, must remain without effect, unless it was his will and pleasure to submit to the decision of his judges. Accordingly we find, that, in early times, there was a vague notion, even among lawyers, of some legal and constitutional power in the state that had authority to command even the King. Something was still wanting in the theory of our constitution. To reconcile the absolute sovereignty of the ideal King with the limited authority of his representative on earth, it was necessary to exempt the real King from direct control, but to render it impossible for him to execute any of his royal functions without responsible ministers and advisers. By this device the theory of our government was made coherent and complete without danger to the public or injury to the subject.

Proof of it.

Before the reign of Edward I. the King of England might have been sued as a common person[1]. In the Year Books of the time of Edward III., it is stated more than once by the judges, that in former times the King might be sued like one of the people, and that the practice of applying to him by petition was introduced by an ordinance of Edward I. (T). It is true that Staundforde[2], who wrote

[1] Comyns' Digest. Action, c. 1.

[2] Exposition of the King's Prerogative, c. 15. f. 42.

on the prerogative in the reign of Elizabeth, doubts whether a subject could ever have maintained such an action against the King; because Bracton [1], who lived in the time of Henry III., states there is no remedy by assize against the King, who has no superior but God; and he might have added another passage from the same author [2], where it is expressly said that a writ does not run against the King. But, with submission to Bracton, his authority as a writer of institutes is not to be placed in comparison with the testimony of judges on the bench, one of whom asserts without contradiction, that he has seen a writ beginning with these words: Præcipe Henry regi Angliæ.

Bracton was deeply impregnated with the doctrines of the civil law, and has made frequent attempts to transfuse its language and spirit into the law of England. There are passages in his book that place the King above control. There are others where he vainly endeavours to reconcile with the maxims of the imperial law the limited monarchy before his eyes. In the very passage quoted by Staundforde, after laying it down as a principle that the King has no superior but God, that there is no remedy against him by assize, nor in any other way but by petition; and that if he refuses to correct the wrong he has done, he must be left to the judgment of heaven; we find, at the conclusion of the paragraph, this qualifying sentence, unless any one should

[1] L. iv. c. 10. f. 171 b. [2] Ibid. Ll. c. 8. § 5. f. 5 b.

maintain, that the body of his kingdom and his baronage may and ought to do this in his own court[1].

In another part of his book, Bracton[2] still more explicitly asserts, that the King has not only a superior in the law, which makes him King, but in his court composed of his earls and barons, who have a right to put a bridle in his mouth, should he be without bridle, that is, without law.

However harsh it may sound to modern ears, the same language is repeated in Fleta[3]. The King, says the author of that treatise, has in the government of his people a superior in the law which made him King, and a superior in his court, that is to say, in his earls and barons.

Opinion prevalent that there existed a legal control over the King.

From these passages in Bracton and Fleta it seems at that time to have been a doctrine admitted even by lawyers, that in matters of justice the King was bound,

[1] Nisi sit qui dicat, quod universitas regni et baronagium suum hoc facere debeat et possit in curia ipsius regis.

[2] L. ii. c. 16. § 3. f. 34.—Rex autem habet superiorem, Deum scilicet. Item legem, per quam factus est rex. Item curiam suam, videlicet comites, barones, quia comites dicuntur quasi socii regis, et qui habet socium, habet magistrum, et ideo si rex fuerit sine fræno, id est, sine lege, debent ei frænum ponere. No wonder that Selden (Works, iii. 1048, 1821) was shy of quoting these words, considering the times in which he wrote. No one can doubt of "the special reason" that moved him to send his readers to Bracton and to the other authorities he cites rather than repeat their words or give their meaning.

[3] L. i. c. 17. § 9. In populo regendo superiores habet, &c.

like other feudal lords, by the decisions of his court, and that even in matters of administration he was liable to the same control. That such was also the popular belief appears from the account given by Matthew Paris[1] of the festivities on occasion of the marriage of Henry III. with Eleanor of Provence. Enumerating the persons who figured in that ceremony, he tells us that the Earl of Chester walked in the procession with the sword of St. Edward in his hand, in token of his right, as Comes Palatii, to restrain the King, should he fall into any errors in his government.

King of Spain may be sued in his own courts.

The apparent anomaly of one invested with sovereign authority being liable to have an action brought against him in his own courts, was not confined to England. The King of Spain could be sued by any of his subjects in his courts of law, though it was a fundamental principle in the Spanish as in the English monarchy, that all jurisdiction, civil and criminal, flows from the King, and that all inferior magistrates derive their authority solely from him[2]. Nor was this an antiquated or empty privilege.

[1] In 1236, p. 421. edit. of 1640.

[2] Marina. Ensayo historico critico, § 47. 53. By the fundamental principles, says this author, of the Visigoth Monarchy, the Kings were "unicos señores, jueces natos de todas las causas, a quienes solamente competia la suprema autoridad y jurisdiccion civil y criminal, y de ellos se derivaba como de fuente original a todos los magistrados y ministros subalternos del Regno." Notwithstanding these high-sounding prerogatives, the Kings of Spain, as he informs us, "estan a derecho

It was frequently exercised in that country, and, if not still in force, it was in use not many years ago. In Spain, as in other kingdoms of Europe, the government was in theory borrowed from the civil law; but in practice, it was qualified and tempered by the usages and principles of nations that never owned subjection to imperial Rome.

Criminal jurisprudence.

In all crimes and misdemeanors affecting the life or security of the subject, the King of England is considered in law as the injured party, and is therefore invested with the exclusive right of prosecuting the offender[1]: that is to say, the prosecution is instituted at the instance of the King; and, if it be thought necessary or advisable, the person who has actually suffered the injury is brought forward as a witness on the trial. But that this was not the view anciently taken of our criminal jurisprudence is apparent from the existence of prosecutions by *appeal*, at the instance of private parties, known from the earliest times, and though little practised of late, not abolished by law till a very recent period.

Prosecutions by appeal.

An appeal in this sense of the word has been defined by Blackstone[2], "an accusation of one private subject

con todos sus vasallos y todos los pueden pedir in todos sus tribunales por justicia lo que por ella pretenden pertenecerlos—asi piden muchos al rey." This work of Marina was written under Charles IV. as a preface to the new edition of the Partidas published by authority of government, and was printed in 1808.

[1] Blackstone, i. 268; iv. 127. 176. [2] Ib. iv. 308.

" against another, demanding punishment on account of " the particular injury suffered, rather than for the offence " against the public." But, with deference to so great a lawyer, this definition does not convey a perfectly just or complete notion of an appeal. It was the object of that proceeding to combine with satisfaction to the private party, reparation to the public for the offence. In another passage[1] the same learned judge has more correctly described an appeal as " a private process for the punish- " ment of public crimes;" and another writer[2] has defined it " the party's private action, seeking revenge " for the injury done to him, and at the same time " prosecuting for the crown, in respect of the offence " done against the public." Nothing more, indeed, is necessary to show that an appeal was an action carried on for the public as well as for the private party, than the fact, that when the appeal was tried, justice was satisfied. If the person appealed was put on his trial and acquitted, the plea of *autrefoits acquit* was a bar to any farther criminal proceeding on the part of the public.

An appeal was commenced by bill or by original writ from chancery, which the officers of the crown could not refuse to any one qualified by law to prosecute. It charged the offender with having wickedly, feloniously, and against the King's peace, committed the crime imputed to him; and if found guilty, he suffered the same punishment as if he had been convicted in the ordinary

[1] Blackstone, iv. 313. [2] Bacon's Abridg. Appeal.

course of law. In two respects an appeal differed from other criminal prosecutions. If a man was appealed by a private person and acquitted, he could not afterwards be indicted by the crown for the same offence; but if tried by indictment and acquitted, or if tried and found guilty and afterwards pardoned by the King, he might still be appealed by the injured party, and tried a second time on the same charge. It was another peculiarity of appeals, that if the person accused was found guilty, he could not receive a pardon from the King[1]. It was held, that in trials by indictment the King had a right to pardon, because in the eye of the law he was the injured person; but that in prosecutions by appeal, he had no right to remit the punishment awarded to the culprit, because in trials by appeal it was the party who had been actually injured that demanded satisfaction for the wrong he had suffered[2].

Prosecutions by appeal are derived from the most remote antiquity. Till the establishment of civil government, every man is the protector of his rights and the avenger of his wrongs. If he receives an injury or insult, he looks to his own exertions for redress, and assisted by his kindred and allies, to whom he renders a similar service in return, he seeks for vengeance or satisfaction. Among the ancient Germans, if any one was wronged, it was the duty of his relations and friends to resent his

Criminal jurisprudence among the ancient Germans.

[1] Staundforde, Pleas of the Crown, 104.

[2] Blackstone, i. 269; iv. 311. 391.

injury and take part in his quarrel[1]. His adversary was in the same predicament. However questionable his conduct, he found kinsmen and associates to maintain his cause. The redress which the one party demanded, the other thought it pusillanimous to grant. Violence was resorted to; retaliation followed; and a civil or rather domestic war ensued, which disturbed the peace of the state, broke its union, and exhausted its strength. To extinguish these feuds, appeals to a common umpire were devised. Courts were established and magistrates appointed to settle the claims and adjust the differences of the hostile factions. A compensation was awarded to the injured party for the loss or injury he had sustained, on the payment of which the offender was relieved from his enmity, and peace for a time restored to the community. Such was the first origin of criminal jurisdiction. Its object was to compose quarrels that would otherwise have been interminable. The complaining party brought his accusation or appeal before the court of the district. The freemen, who were present, heard and decided the cause under the direction of the magistrate or judge. The latter pronounced sentence, and saw it carried into execution.

[1] Suscipere tam inimicitias sui patris sui propinqui quam amicitias necesse est. (Tacit. de Mor. Germ. § 21.) By the laws of the Anglii and Werini (Tit. 6. § 5.) he who was heir to the landed property of another, inherited with it his coat of mail, the duty to avenge his injuries, and the right to receive the legal composition for his death.

Pecuniary compositions.

It is probable that compensations for injuries were originally settled by private agreement between the parties; and when courts of law were established, that the amount was determined in every particular case by the tribunal that decided the affair[1]. Custom must gradually have introduced some degree of uniformity in these decisions; and law at length interposed and affixed for every imaginable offence a suitable compensation, which the one party was bound to make and the other to accept as a sufficient atonement for the injury. A penalty to the state was annexed, as a remuneration to the magistrate for his trouble, and as a forfeit to the community for the violation of its peace by the offender.

That the primary object of pecuniary compositions for criminal acts was the extinction of feuds, is expressly declared in the laws of Rotharis, King of the Lombards, and clearly evinced by a regulation of his successor Liutprand[2]. If a man was slain, who had no sons, but left daughters whom he had instituted his heirs, Liutprand ordained, that, notwithstanding the disposition the father had made of his property, the composition for his death should go to his male relations, because his daughter could not take off the feud[3].

[1] A vestige of this ancient usage is to be found in one of the Anglo-Saxon laws of Ethelbert (64). If a man had his thigh bone broken and was made lame by the injury, friends or arbiters are directed to interpose and assess the damages.

[2] Leg. Langob. Rotharis, 45. 74. Liutprand. L. 2. § 7.

[3] Quia filiæ ejus—non possunt faidam levare.

Among the Frisians, who of all the northern Barbarians made the slowest advances in criminal law, the magistrate, in cases of homicide, had no right to interpose his authority between the culprit and the kindred of the person slain, unless it was at the request of the latter; and so late as 1369 he could not proceed against or punish the criminal without their concurrence. The dead body was exhibited to him by the relations, as an evidence of the fact and assertion of their right to satisfaction. It was then interred in their presence, and one of them striking the grave with his sword, thrice exclaimed, Vengeance! vengeance! vengeance! The perpetrator or contriver of the deed was by law left exposed to their feud, unless he could appease their wrath by such atonement as they were willing to accept[1].

Compensation for bodily injuries and other wrongs not affecting life, was made to the sufferer, or to those in whose tutelage or protection he was placed. If his life was taken away, the composition due for him was divided among his kindred and allies, and part of it was given to his lord. The distribution varied in different countries and at different times. It was not, however, entirely gratuitous. The person entitled to compensation for the loss of his kinsman or ally, was bound in return to assist his kinsman or ally in the discharge of any penalty he incurred; and the portion he had to contribute in the latter case was regulated by the share he had to receive

[1] LL. Fris. Tit. 2. § 2. with the note annexed to it. Canciani, iii. 6.

in the former. Such, at least, was the rule among the Anglo-Saxons[1].

Crimes considered as offences against the state,

As civilization improved, better notions of criminal jurisprudence began to prevail. Crimes were considered as offences against the state, and not as mere injuries to individuals. Instead of being content with compensation to the sufferer, it became the chief object of penal law to deter from crime by the dread of punishment. In cases of aggravated guilt or of heinous transgression, pecuniary compensations fell into disuse, and the culprit was made to suffer in his person for the crime he had committed. From the time of Alfred to the reign of Canute, we find a gradual increase in the number of offences, for which no composition in money could be admitted[2].

as offences against the King,

When the fiction was adopted of an ideal King, as the representative of the state, offences that disturbed the peace of the community were considered as injuries to the King, and prosecutions for the public were conducted in his name.

but appeals maintained their ground.

The ancient process by appeal, however, maintained its ground, and continued to be one of the principal instruments of criminal law. Where it had been before admissible, it was still competent for any one, who thought himself aggrieved, to institute a criminal prosecution against his wrongdoer. Appeals were the subject

[1] H. 75. Parentes tantum ejus weræ reddant quantum pro ea reciperent, si occideretur—reddant parentes ei quantum de ejus interfectione reciperent.

[2] Ælfr. 4. Æthelst. 1. Edm. P. 6. Edg. P. 7. Ethelr. 1. 3, 4. Cn. P. 23. 54. 61. 75, &c.

of many statutes, and occupied a large space in every law book. To remedy an inconvenience arising from the preference given to this mode of trial over indictment, a fundamental principle of law was violated in its favour. It is a maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence. The plea of *autrefoits acquit* was therefore a general bar to every criminal prosecution. But by a statute of Henry VII. it was enacted, that a former acquittal on an indictment should be no bar to the prosecution of an appeal for homicide[1].

Different sorts of appeal.

There were anciently appeals for homicide, mayhem, wounding, assault and battery, false imprisonment, rape, burglary, arson, robbery, larceny, and other private crimes, and even for treasons and other offences against the public. In the progress of time some of these appeals have been converted into civil actions; others have been abrogated; and in the late reign[2] the last relic of this ancient procedure was abolished by act of parliament. The crown has now in fact as well as in theory the exclusive privilege of controlling criminal prosecutions.

In appeals the right of pardon, though denied to the King, was enjoyed substantially by the prosecutor. He might grant a release to his antagonist, which was a bar to further proceedings[3]. This right was founded on the

[1] 3 H. VII. c. 1. Blackstone, iv. 329. Staundforde, P. C. 107.

[2] By statute, 59 Geo. III. c. 46.

[3] Staundforde, P. C. 59. 98.

principle, that it is allowable for any one to renounce the benefit of a law which he has invoked in his own favour[1]. On the same principle one subject might grant to another a general pardon for all manner of trespasses, felonies, robberies, arsons, and homicides committed in his lordship, as far as related to himself; but it does not appear that such letters of pardon were available in indictments on the part of the crown. It was customary also for private parties, who had grounds of complaint against each other, to grant a mutual release discharging all actions, civil or criminal, on either side[2].

Letters of security.

While pecuniary compositions for homicide and other transgressions were admitted in law, it was usual, after the affair had been compromised, for the plaintiff to give a letter of security to the defendant against further proceedings of the judicial authorities as well as against the enmity of himself and his heirs[3]. But this was not a private transaction, as Dr. Robertson seems to have imagined[4]. The compromise was settled in the public court of the district, and the agreement as well as the security it recited, was attested by the members of the court. Sometimes the count or graf himself was the person who granted the security, stating that the person, to whom it was given, had paid what the court had awarded[5].

[1] Blackstone, iv. 312.

[2] Madox Formulare, No. 702, 703. 705.

[3] Marculf. Form. ii. § 18. App. § 23. Form. Sirmond. § 39.

[4] Charles Vth. Introd. Note 23.

[5] Form. Bignon. § 8.

The proceeding in compositions for homicide in England is minutely explained in the Anglo-Saxon laws[1]. The offender was in the first instance to give assurance to his spokesman, that he was ready to make composition for his guilt, and this assurance the spokesman was to convey to the relations of the person slain, who in their turn were to give assurance to the spokesman, that the slayer might approach them in peace and pledge himself for the payment of the weregild. When this was performed, and the sureties required by law had been produced, the King's peace was established between the parties, which was done by the kindred on both sides swearing on the sword of the umpire, that the King's peace should not be disturbed. Nothing then remained but to make the stipulated payments in the order and at the periods prescribed by law.

Proceeding in compositions for homicide.

From the same principle that gave to a subject the right of discharging an appeal he had brought before a court of justice, the lawyers have derived the prerogative of mercy enjoyed by the crown. As representative of the state, the King may frustrate by his pardon an indictment prosecuted in his name. In every crime that affects the public he is the injured person in the eye of the law, and may therefore, it is said, pardon an offence which is held to have been committed against himself[2].

Royal prerogative of mercy.

Mercy as well as prosecution is now the exclusive

[1] Edm. P. 7. Edw. et Guthr. sub fine.

[2] Blackstone, i. 268, 269.

attribute of the King. But it was long before the right of pardon was vested either absolutely or solely in the crown. In the time of Edward III. and Richard II. various laws were passed that limited in felonies the royal prerogative of mercy[1]. Pardons for homicide, granted out of parliament, were declared to be void, unless the homicide had been committed in self-defence or by misfortune. It was only by the insertion of clauses of *non obstante* in charters of pardon that these statutes were evaded[2]; and when that fraudulent invention was extinguished by the revolution, it became a doubt whether the crown had a right to pardon murder generally. It was decided, however, by the Court of King's Bench, that as the subject may discharge an appeal, so the King may pardon on an indictment for murder[3].

Palatine jurisdictions.

Until the reign of Henry VIII. the right of pardon, such as it existed by law in England, was not confined to the crown. It extended to Earls Palatine and others possessed of what were called royal franchises. Earls Palatine, says Bracton[4], have regal jurisdiction in all things, saving the supreme dominion of the King. They had the same right as the King to remit and pardon treasons, murders, and felonies, and to remit outlawries within their jurisdiction; they appointed judges of eyre, assize, and gaol delivery, and justices of the peace; all

[1] 2 Edw. III. c. 2. 4 Edw. III. c. 13. 10 Edw. III. c. 2. 14 Edw. III. c. 15. 27 Edw. III. c. 2. 13 Ric. II. st. 2. c. 1. 16 Ric. II. c. 6.

[2] Staundforde, P. C. 102.

[3] Blackstone, iv. 401.

[4] L. 3. c. 8. § 4. f. 122 b.

writs, indictments, and processes were made in their name, to the exclusion of the King's writ and judicial authority; and all offences were said to be committed against the peace of the lord of the franchise as in other places against the peace of the King[1]. In short, they possessed within their franchises every judicial authority of the crown, with the exception of those latent prerogatives inherent in the King in his ideal character. They had the same rights, but not the same theory to support them. They exercised the same powers, but had neither the same means to defend them, nor the same pretences to extend them. What they enjoyed they were held in law to have derived from the crown, and in fulness of time they were compelled to render back to the crown what they were supposed by the law to have received from its bounty. By the act of Henry VIII.[2] the greater part of the privileges that had belonged to the lords palatine were taken from them and annexed to the crown, from which, it is said in the preamble to the act, they had been severed by sundry gifts of the King's most noble progenitors, the kings of this realm.

That the palatine jurisdictions regulated or abolished by this act had been granted or confirmed by the crown to the ancestors of the persons, who at that time enjoyed them, cannot be denied; but, that they had been severed from the crown, that there had been a time, when the

[1] 4 Inst. 205. Blackstone, i. 117. [2] 27 H. 8. c. 24.

districts where they were exercised had been administered on the same footing with the other parts of the kingdom, requires more than the assertion of an act of parliament to establish. Several of them existed by prescription, and some of them could be traced back to the conquest. The Earl of Chester was said to hold his earldom by his sword as the King held the realm of England by his crown. He had his barons and his parliament like the King. In Saxon times the great earls of the Mercians, Northumbrians, and East-Angles possessed what was afterwards called palatine jurisdiction within their governments[1]. They owned the supremacy of the King, and occasionally they were made to bend to his power; but in general they were little troubled with his interference, and were left to administer with regal authority the districts subject to their command. It was not till the Norman conquest that England was truly consolidated into a single monarchy. The different kingdoms into which it was originally divided, had till then remained in many respects distinct, regulated by different laws, governed by separate assemblies, and administered by local authorities of their own. The conquest united them into one whole, with the exception of particular districts, that still retained some remnant of their primitive independence; and it was not till the act of Henry, that, with the exception of the duchy of Lancaster, these districts were placed under the same judicial system with the kingdom at large.

[1] Selden's Works, iii. 673.

In what manner and by what authority the great Saxon earldoms were conferred, we have no certain information. On some occasions they seem to have been given away by the King; in other cases, to have been disposed of by the people, and the choice the people had made, to have been subsequently confirmed by the King. In many of them a tendency to hereditary succession in the same family is discernible; but, as in the descent of the crown, so in the succession to these inferior dignities, collaterals were often preferred to the lineal heir. It is probable, that in England as on the Continent at the same period, there was no settled rule of succession, none at least that was strictly observed in practice.

Right of private war among the Anglo-Saxons.

Appeals to courts of justice had been invented to supersede the use of private war in the prosecution of family feuds and adjustment of private quarrels. But, from the weakness of the government and the turbulence of the people, it was long before that salutary object could be fully attained. The Saxon laws endeavoured to regulate and limit, but made no pretensions to abolish the right of private war. Every man, says Alfred[1], may fight for his hlaford without incurring any penalty, if his hlaford be attacked; and so may a hlaford fight for his man. A man may also fight for his natural-born kinsman, if unjustly attacked, against every one except his hlaford; for *that* we do not allow. If any person is slain, says a law attributed to the Confessor[2], compensa-

[1] Ælf. 38. H. 82. [2] Conf. 12.

tion must be made to his kindred, vel guerra eorum portetur, from which comes the English proverb, "Buy "the spear from your side or bear it." Innumerable passages in the Saxon laws admit the legality of the feud.

In cases of flagrant or aggravated injury vengeance was permitted without waiting for slow redress from law. If any one slew another openly, he was delivered over to the kindred of the person slain[1]. If a man detected any one with his wife or daughter, or with his sister or mother, within closed doors, or under the same coverlet, he might slay him with impunity[2].

But, though private war in the prosecution of the feud was permitted by the Saxon law, various regulations were made to lessen its frequency and moderate its violence. It was a general rule, that no one, in ordinary cases, could take vengeance into his own hands till he had demanded justice in vain[3]. If he knew where his adversary resided, he was bound to summon him before a court of law[4]. This citation was to be repeated three times in the presence of good witnesses, and notice was to be given to the defendant's lord and to the court where he was summoned to appear[5]. If he continued refractory, the prosecutor might then besiege him in his house; but for seven days the besieging party was prohibited from using violence, unless the besieged attempted to break out. At the end of seven days, if the defendant

[1] Cn. P. 53. [2] Ælf. 38. Gul. 37. H. 82. [3] In. 9.
[4] Ælf. 38. [5] H. 82.

was willing to deliver up himself and his arms, the prosecutor was bound to accept his surrender and to keep him in safe custody for thirty days, giving notice to his friends and relations that it was still in their power to redeem his life. If the prosecutor had not strength sufficient to invest the house, he was to apply to the ealdorman for aid; and if the ealdorman refused him assistance, he was to apply to the King, before he could attack the person of his enemy. If a man met accidentally with his adversary before he was informed of the place of his residence, the latter might offer to surrender and give up his arms, and in that case also the prosecutor was bound to detain him in safe custody for thirty days and give notice of his situation to his friends; but if he refused to yield, the other might attack him on the spot. If violence was used against any one who offered to surrender, compensation was required from the aggressor for all the consequences that followed[1].

If a man exposed to the feud made his escape into a church that had been consecrated by a Bishop, he could not be taken out by force for seven days, if he was able to endure hunger so long; for no food was to be carried in to him. If he chose to surrender and deliver up his arms, his enemies were bound as usual to keep him in custody for thirty days, and give notice to his relations[2]. It is probable that other rights of asylum, though not specially destined for this use, gave to persons exposed to

[1] Ælf. 38. H. 83. [2] Ælf. 5.

the deadly feud the same protection which they afforded to criminals of a more obnoxious character and less deserving of commiseration [1].

If any one in prosecution of the feud, or in self-defence, killed another, he was not to aggravate his guilt by the plunder of the person he had slain (U). He was to take nothing that belonged to him, neither his horse, nor his helmet, nor his sword, nor his money. He was to dispose the body decently on the shield the person had worn, if he had one, with his head to the east and his feet to the west, with his lance fixed, his arms around him, and his steed reined. He was then to go to the nearest village, and relate what had happened to the first person he met, in order that an inquisition might be held into the circumstances of the case, with a view to the further proceedings that might be necessary [2].

To facilitate the extinction of feuds, a singular rule was invented. If a number of persons were slain in a fray between two parties, an account was taken of the slaughter. If it was equal on both sides, neither party had a right to claim compensation or to exact vengeance; but if there was any difference, the party that had suffered most was entitled to satisfaction for the amount of the difference. In this computation a twelfhyndman was valued at six ceorls or twyhyndmen, because the weregild of a twelfhyndman was equal to the weregilds of six ceorls [3].

[1] In. 5. Ælf. 2. Æthelst. p. 63. Edm. P. 2. Ethelr. p. 110.
[2] H. 83. [3] Wilk. Leg. Anglo-Saxon. p. 64. 72. H. 64. 70.

If any one apprehended a thief, the relations of the culprit were bound to abjure the feud against the captor. The same was required, if a person was slain in attempting to escape from justice, or in circumstances that made him justly liable to suspicion; but if there was any doubt of his guilt, his relations were entitled to prove his innocence [1].

If any one was accused of a homicide that exposed him to the feud, he might offer himself for legal exculpation from the crime with which he was charged [2].

A monk was not liable to the feud for offences committed by his kindred. When he professed, he renounced the obligations as well as the privileges of relationship. A secular priest was not exempt from either [3].

On the continent.

Corresponding attempts were made in other parts of Europe to restrain the excesses and diminish the frequency of feuds. If a man was killed unintentionally, or by accident, a composition was due to the family for the loss they had sustained, but the person who had caused his death was exempt from the feud [4]. If a man was slain in the commission of theft, his relations had no claim to compensation for his death, unless they asserted his innocence, and the person who slew him could not establish his guilt [5]. If a man was detected in the night

[1] Wihtr. 29. In. 20, 21. 28. 35. Æthelst. 11. Æthelr. W. 11. Conf. 36. H. 64. 74.

[2] In. 46. 54. Cn. E. 5. P. 36. H. 64. 66.

[3] Wilk. Leg. Anglo-Saxon. 115. Cn. E. 5.

[4] L. Saxon. t. 12. § 1. L. Langobard. Rotharis. § 389.

[5] L. Angl. et Werin. t. 7. § 4.

within the close of another, and refusing to surrender, was killed, no composition was due for him [1]. If persons summoned to the army committed depredations in their way, and any of them were slain on that account, no feud could be maintained by their kinsmen or their lord [2]. If a man was put to death by order of the King or general, the person who executed the order was not liable to the feud [3]. If a serf slew a man without the knowledge of his master, the latter was bound to give up the serf, but was himself exempt from the feud [4].

To check the extension of feuds in cases of homicide, the Burgundian law prohibited the relations of the person slain from taking vengeance on any one but the actual perpetrator of the deed [5].

To afford a man exposed to the feud some security against the attacks of his enemies, the Saxon law made it a capital offence to kill any man in his own house [6]. Even the Frisic law, which had such respect for the rights of private vengeance, gave protection to those endangered by the feud, at church and at home, in going to and returning from church, and in going to and returning from the public court of the district [7]. The Anglo-Saxon law, in like manner, gave assurance of safety in courts of justice, and to all persons going to or returning from them [8]. The Bavarian law went still

[1] L. Langob. Rotharis. § 32. [2] L. Langob. Carol. M. § 34.
[3] L. Bajuv. t. 2. c. 8. § 1. Capitul. l. 5. § 367. [4] L. Saxon, t. 2. § 5.
[5] L. Burgund. t. 2. § 3. [6] L. Saxon, t. 3. § 4.
[7] L. Fris. Addit. t. 1. § 1. [8] Æthelst. 20. Cn. P. 79.

further, and proclaimed a general peace throughout the province while the courts of justice held their stated meetings [1].

To prevent the revival of feuds after compositions had been made, it was declared by the Lombards that if any one slew a man, from whom he had accepted legal compensation, he should pay back twice the amount of what he had received [2].

To accomplish the entire extinction of feuds was the object of many regulations of Charlemagne and his successors. When any one was slain, the Count, in whose district it happened, was directed to compel the offender to pay, and the other party to receive the composition established by law; and till this was effected, he was enjoined to bind them by sureties to keep the peace. If they were refractory, the Count had instructions to send them before the Emperor; and if any one, after peace had been made, slew his adversary, he was deprived of the hand that committed the deed, and in addition to the legal composition for the slaughter, he incurred a penalty for his disobedience [3].

It is needless to add, that the speedy decline and downfall of the Carlovingian monarchy rendered these provisions ineffectual. In spite of the united efforts of law and religion, private war continued to be the scourge of Europe for many centuries. The devices of churchmen

[1] L. Bajuv. t. 2. c. 15. § 1. [2] L. Langob. Rotharis. § 74. 143.

[3] Capitul. l. 3. § 4.; l. 4. § 27.; l. 5. § 205. 247.; l. 6. § 271.; L. Langob. Carol. M. § 19, 20. Ludov. P. § 21.

and enactments of princes to put it down, have been collected with diligence and enumerated with care by Dr. Robertson[1]. Though slow in their operation and often frustrated by the pride and passions of individuals, they were at length crowned with success. Private war has disappeared, and the only vestige of it that remains is the practice of duelling, which is every where prohibited by law, and every where tolerated and connived at.

Relaxation of the bonds of kindred.

While the Anglo-Saxons were advancing with the other nations of Europe towards the feudal system, the bonds of relationship were gradually relaxed. As early as the reign of Alfred, if not sooner, the artificial tie, that connected a man with his hlaford, was esteemed of a higher and more sacred character than the duties he owed to his kindred[2]. In several laws of the same period we find particular cases stated, where the relations of a culprit were exempted from the obligation of making compensation for his misdeeds or of becoming sureties for his conduct[3]. A law was at length passed in the time of Edmund, that if a man committed homicide, he alone should bear the feud, unless his kinsmen by their subsequent conduct made themselves answerable for his transgression. They were at liberty to assist him in compounding for the offence; but if they refused they were not liable to the feud, unless they gave him food or protection; and if one of the adverse faction took vengeance on any person, except the perpetrator of the crime, or

[1] Charles V. Introduction, note 21.

[2] Ælfr. 38.

[3] Edw. 9. Jud. Civ. Lundon. 12.

one who harboured him, he was declared an enemy of the King and of all the King's friends[1]. From one of the laws published in the name of Henry I.[2], it appears that among the Anglo-Saxons, as among the Franks, a man might abjure the ties of kindred; and in that case while he withdrew from the obligations, he renounced all the advantages of that connexion. If any of his relations died, he had no part in the inheritance; and if any of them was slain, he had no share in the composition paid for the slaughter. When he died, his inheritance went to his children, and failing them to his lord; and if he was slain, the composition for his death was disposed of in like manner. By the Salic law, as amended by Charlemagne, the composition and inheritance of a man who had renounced his kindred went to the Fisc, that is, to the state[3].

Among the Scandinavians the primitive obligations of kindred continued in force to a much later period than in England. Till the time of Magnus Lagabæter, who flourished in the 13th century, a person guilty of homicide had a right to call on his relations, though no parties to the crime, to contribute their share towards the discharge of the penalty he had incurred. By a constitution of Magnus Lagabæter[4], this right was

[1] Edm. P. 1. [2] H. 88. [3] L. Salic. Ref. t. 63. § 3.

[4] Gulathings Laug. Preface, 16. The Gula-things-laug was compiled by Magnus, son of Haco, with advice of the best men of his kingdom. It was read and adopted by the

abolished, and the criminal made to pay from his own effects the whole of the penalty due for his transgression.

A similar law existed anciently among the Franks. If a man committed homicide and had not wherewithal to pay the legal composition for his offence, he was enabled, by a process called *chrenecruda*, to compel his kinsman to discharge the debt. This law was abrogated in the sixth century by a decree of Childebert [1], in which it is termed a pernicious device, invented in times of heathenism; but, notwithstanding this repeal, it seems to have been in operation as late as the age of Charlemagne. In the Salic law promulgated by that monarch [2], it is repeated in nearly the same words as in the ancient code compiled before the introduction of Christianity. It was, however, in the power of any man to relieve himself from this obligation by a solemn renunciation of his kindred in the courts of law [3].

Relation of lord and vassal maintained the practice of private war.

The relaxation of the bonds of kindred had little or no effect in abolishing feuds and private wars. The relation of lord and vassal succeeded to the connexions

members of the Gulathing in 1274, and afterwards extended over the whole of Norway with consent of the *things* or legislative assemblies of the different provinces.

[1] Baluz (i. 17.) ascribes this decree to Childebert II., who reigned from 575 to 596. Dom Bouquet (iv. iii.) refers it to Childebert I., son of Clovis, who was King from 511 to 558.

[2] Pact. Leg. Sal. Ant. t. 61. Reform, t. 61.

[3] Pact. Leg. Sal. Ant. t. 63. Reform, t. 63.

of kindred with nearly the same duties and obligations on both sides. From Glanville [1] it appears, that in the reign of Henry II., when the royal authority in England was still maintained at the height to which it had been raised by the Conquest, the vassals or tenants of a lord were bound to assist him in his private wars. If a man was tenant of more lords than one, he was required to serve in person with his chief lord, and to perform by deputy the service due by his tenure to the others. But, though entitled to the personal service of his tenant in the field, it was doubtful whether the lord could exact from him an aid for carrying on his wars, as he might do for knighting his eldest son or marrying his eldest daughter [2]. The law appears to have continued the same in the time of Bracton. If a tenant had several lords, and quarrels arose among them, he was required to stand by his chief lord in person, and to discharge his services to the others by attorney. Fleta transcribing, as the author of that work usually does, from Bracton, lays down the same rule in nearly the same words. In Britton there is no mention of private war [3]. The practice was going into disuse, and in less than half a century it was adjudged to be illegal. A variety of reasons may be assigned for a change in its consequences so beneficial to the kingdom. The regular distribution of justice in the courts of eyre and assize must have tended to banish

[1] Glanville, lib. 9. c. 1. [2] Glanville, lib. 9. c. 8.

[3] Bracton, l. 2. c. 35. § 5. f. 79. b. Fleta, l. 3. c. 16. § 16. Britton, ch. 68.

this irregular mode of obtaining justice for private wrongs; appeals were open to prosecutors for the redress of their personal injuries; and though the continual complaints of disseisins and redisseisins show, that recourse was still had to violence for the recovery of actual or pretended rights, the severe penalties against acts of vengeance and illegal distresses must have had the effect to restrain, if not entirely to extinguish them [1]. In the reign of Edward III. private war was deemed an accroaching of royal power [2]; and by the statute of treasons, the exercise of that ancient right, though it ceased to be treason, was declared to be either felony or trespass as the case might be [3].

Private war in England after the Conquest.

It is true, there are few memorials of private war on an extensive scale in England after the Conquest, except in times of turbulence and civil commotion. Madox [4] however has published a singular document, containing a formal truce or cessation of hostilities for sixteen days between the Earl Mareschal and the Earl of Gloucester, during which Sir Roger de Clifford was to repair to the Earl of Gloucester at Cirencester, for the purpose of concluding a treaty of peace between those potent earls; and from any thing that appears on the face of the in-

[1] See particularly the statute of Merleberge, 52 H. 3. c. 1.

[2] Hale, P. C. i. 80. [3] 25 E. III. st. 5. c. 2. § 13.

[4] Madox, Formulare, No. 155. Madox conjectures, that the Roger de Clifford mentioned in this deed was the same Roger de Clifford, who lived in the time of John and Henry III. The last Mareschal, Earl of Pembroke, died in 30 H. III.

strument the transaction seems to have been legal and usual. In the reign of Edward I. the Earls of Gloucester and Hereford, after committing sundry acts of violence against each other, applied to the King for justice, and were in consequence inhibited by the King in parliament from further hostilities. Notwithstanding the prohibition, they invaded each other's lands with banners displayed, slew divers persons and carried off much booty. For this contempt they were fined and imprisoned[1]. But from the warfare they had previously carried on with impunity, it does not appear, that their conduct on this occasion would have been punished, if they had not disobeyed the royal commands solemnly announced to them from parliament.

The last instance of a pitched battle between two powerful noblemen in England occurs in the reign of Edward IV. It was fought at Nibley Green in Gloucestershire, on the 10th of August, 1470, between William Lord Berkeley and Thomas Viscount Lisle.

[1] Rot. Parl. i. 70. 77. The Earl of Gloucester implicated in this transaction was the same Gilbert de Clare, who in the preceding reign had assisted Prince Edward in his escape from the Earl of Leicester, and who had contributed powerfully to the success of the royal cause at the battle of Evesham. He had married a daughter of the King subsequently to the commencement of his private hostilities with the Earl of Hereford, and had by her a son, who was killed at the battle of Bannockburn.

Lord Berkeley is said to have brought a thousand men into the field. Lord Lisle and a hundred and fifty men were slain in the action. After the battle was gained, Lord Berkeley proceeded to Lord Lisle's house at Wootton and ransacked it as a place taken in lawful war. The cause of the quarrel was a lawsuit about the succession to the Berkeley estates. Lord Lisle had challenged his competitor to decide the question of right by single combat, or else to bring with him into the field the utmost of his power; to which Lord Berkeley replied, that no such determination of the right to land was used in England, but that he would meet Lord Lisle with his friends and followers at the time and place appointed. The lawsuit that gave occasion to this battle lasted a hundred and ninety-two years, and in the course of it Berkeley castle was once taken by surprise and its inmates thrown into prison, and was frequently besieged and defended with effusion of blood. There seems to have been nothing of a political character in this conflict, as both parties were adherents of Edward IV. Neither side was called to account for their proceedings by the government. The widow of Lord Lisle raised an appeal against Lord Berkeley and his brothers for the death of her husband. But the affair was compromised without trial. She accepted a hundred pounds a year in satisfaction for her loss, and renounced her claim to the lands in dispute; and this agreement was ratified in parliament, without any allusion to

the battle at Nibley Green or to the death of Lord Lisle[1].

KING SAID TO BE THE FOUNTAIN OF HONOUR.

The King is held in law to be the fountain of honour as well as of justice, and he possesses in fact the sole power of dispensing honours and dignities[2]. This prerogative, like others, he shared for many ages with his subjects. In times of chivalry knighthood was the great personal distinction between one man and another. It was the rank most highly esteemed and most eagerly sought after. To have obtained it was a proof of valour and mark of desert. But this honour, thus coveted by all, it was in the power of any private person, who was himself a knight, to bestow. It was not till a period comparatively modern, that the right to confer the honour of knighthood was vested exclusively in the crown.

TENURE OF LANDED PROPERTY.

All landed property in England said to be derived originally from the bounty of the King,

The fiction of law, that the King is the ultimate proprietor of all the lands in his kingdom, has its origin,

[1] Dugdale's Baronage, i. 362. 365. Atkyn's Gloucestershire, 138. Ruder's Gloucestershire, 574. Rymer's Fœdera, xi. 655. Rot. Parl. 12 and 13 E. IV. No. 23.

[2] Blackstone, i. 171.

like his other transcendent prerogatives, in the attributes ascribed to him in his ideal capacity. It is a fundamental maxim and necessary principle of English tenures, "that "the King is the universal lord and original proprietor "of all the lands in his kingdom, and that no man doth "or can possess any part of it, but what has mediately "or immediately been derived as a gift from him." But in justice to modern lawyers it must be remarked, that in laying down this proposition, which supposes that every landed proprietor owed his lands at one time or other to the bounty of the crown, they consider it as a mere fiction of law, which has no foundation in reality or truth[1]. No one will now-a-days tell us with gravity, like Madox, that "King William I. was seised "of the whole kingdom of England in demesne; that "he retained part of it in his own seisine; and other "part thereof he granted and transferred to others[2]." If it were necessary to refute an assertion so utterly destitute of truth and probability, it might be asked, how came Duke William by his victory over Harold to acquire the whole land of England in his own seisine? Did he not bind himself by his coronation oath to maintain his subjects in their rights, and govern them by their ancient laws, and was that obligation compatible with the universal confiscation of their estates? Are there not reports of judicial proceedings in his reign, which show that claims to property in land were tried and

a mere fiction of law.

[1] Blackstone, ii. 51.

[2] Baronia Anglica, b. 1. ch. 2. p. 25.

decided by charters and title deeds derived from the Saxons? Are there not innumerable proofs in Domesday, that lands were held under the Conqueror by the same proprietors who had enjoyed them under the Confessor; and what evidence is there, that in the mean while they had passed into the temporary occupation of the crown? But, suppose the conquest of William to have been as complete as the most extravagant of our prerogative writers have ever imagined; suppose the native English, when they accepted him for their King, to have already forfeited all right to their former possessions; had he not Norman followers, who claimed their share in the fruits of their common victory? Were not many of his companions in the enterprise foreign adventurers, unconnected with him by any ties but those which they had voluntarily contracted? Had not many of them joined in his expedition on the express condition, that, if successful, they should receive their portion of the spoil in reward of their services? Were the lands they acquired in virtue of such a compact to be considered as spontaneous gifts of royal munificence? Were they so regarded by the followers of the Conqueror? Two centuries afterwards, when Earl Warrenne was called upon by the commissioners of Edward I. to produce his titles to the lands he inherited from his ancestors, he unsheathed his sword and produced *that* as his title, saying, "My "ancestors came in with William the Bastard and won "these lands by the sword, and by the sword I will "defend them. William did not conquer for himself

" alone, nor was it for such an end that my ancestors " lent him their assistance[1]."

Character and government of the ancient Saxons.

Nor is it more credible that, on the first occupation of England by the Saxons, the conquerors transferred the territory they subdued to the general they had appointed to conduct their army. Of all the Teutonic tribes that in the fifth century established themselves on the ruins of the empire, the Saxons had been the least improved or corrupted by former intercourse with the Romans, and had therefore the strongest stamp of the original character of their ancestors. They were the most unlikely, from their previous habits and institutions, to confer unnecessary or extravagant gifts on their chief; or to hasten, like settlers from a civilized state, to parcel out and convert into private property the lands and possessions they had acquired. No people of German origin retained so much of their primitive form of government after they quitted their native forests, and none maintained it with equal pertinacity and perseverance. Many parts of it resisted the Norman conquest, and there are fragments of it in existence at the present day.

So late as the eighth century the Saxons on the Continent remained strangers to the government of a chief magistrate with the appellation of King. Every district had its ealdorman and every township its *gerefa*. When threatened with war, the ealdorman selected a

[1] Rapin, i. 360. Tindal's note.

general in chief to command their army. On the return of peace, his authority ceased, and every one reverted to his former condition[1]. With such notions of equality at home, can it be supposed, that, when successful abroad, they gratuitously conferred on the leader they had voluntarily followed, the whole fruits of the victory they had achieved? Such a sacrifice might have been made to a chief by his immediate companions[2]; but the expeditions of the Germans for conquest or plunder, though conducted by private warriors, were in some degree national undertakings. They were prepared and discussed in a general assembly of the tribe. None were compelled to enlist in the expedition; but all who proffered their services were accepted. When once engaged, it was reckoned infamous for any one to retract. The recreant was pursued by public indignation and set down as a traitor and deserter, unworthy of credit and unfit to be trusted[3].

It is no less improbable, that bands of adventurers emerging, like the Saxons, from the interior of Germany, where private property in land was hardly known, should have begun by converting into permanent possessions for individuals, the lands they had acquired by their united efforts.

Land belonged to the community among the ancient Germans.

Among the ancient Germans the territory possessed by the tribe was considered as the property of the community. It was divided into cantons or districts, and

[1] Bede, l. 5. c. 10. [2] Tacitus de Mor. Germ. § 14.

[3] Cæsar de Bell. Gall. vi. § 23.

these again were subdivided into townships. In every division there was a chief, an assembly of freemen for the regulation of its internal concerns, and a tract of land for the subsistence of its inhabitants. Portions of land were assigned to families and individuals, and after a certain time resumed and distributed to others. In the time of Cæsar these allotments were annual. No one was permitted to retain the same spot of ground for more than a year. Agriculture was little regarded, war and hunting were the favourite occupations of the people, and their food consisted chiefly of milk and cheese, and the flesh of animals[1]. When Tacitus wrote, the lands of the tribe continued still to be divided among its members by public authority. Every township had an allotment proportioned to its population, and this allotment was parcelled out among its inhabitants according to their rank[2]. We are not told whether the grants to individuals were still annual; but from the progress made in agriculture since the time of Cæsar, it is probable that the same lands were occupied by the same persons for a number of years, if not for life. The husbandry of the Germans was still careless and slovenly, and the cultivation of the ground was still regarded as an ignoble employment, unworthy of warriors. But agriculture had become a greater object of interest and attention in the age of Tacitus. Corn was raised in more abundance; an in-

[1] Cæsar de Bell. Gall. iv. § 1. vi. § 22.

[2] Tacitus de Mor. Germ. § 26.

toxicating liquor was prepared from it; serfs paid their rent in corn as well as in cattle; and granaries were constructed under ground, to conceal it from hostile devastations and protect it from the inclemency of winter[1]. Land that had been cultivated one year was allowed to lie fallow the next[2]; and, if we may judge from what was afterwards the general practice of Europe, the stubble fields and fallows were open to all the cattle of the village.

Commencement of private property in land.

If the Germans in the age of Tacitus[3] had any patrimonial interest in their lands, it was most probably confined to the spots of ground on which they erected their habitations. A German village consisted of separate houses, built at some distance from one another, and irregularly disposed as inclination or convenience dictated. Every house was surrounded by a vacant space or enclosure, which separated the possession of one man from that of another. The houses, though constructed of rude materials, and deficient in symmetry and convenience, were not destitute of ornament and decoration. They had ceased to be the rude cabins of a migratory people, and were become the residence of men who preferred a fixed dwelling-place to a continual change of habitation. It has been plausibly conjectured, that these houses, with the enclosures attached to them, constituted the first permanent property in land among the Germans; and from

[1] Tacitus de Mor. Germ. § 14, 15, 16. 23. 25.

[2] Ibid. § 26. Arva per annos mutant.

[3] De Mor. Germ. § 16.

the progress they had made in agriculture since the time of Cæsar, it is probable that the annual partition of land, described by that author, had ceased, and that individuals continued for a series of years, if not for life, in the occupation of the same lands. The territory of the tribe was still the property of the community. But portions of it had been permanently withdrawn from the common stock, and converted into lands of inheritance; and what was left, though still distributed as before when vacant, instead of changing its owners every year, remained for a longer period in the possession of the same person. We shall afterwards find, that, with modifications arising from the gradual increase of lands possessed by inheritance, this is no unfaithful picture of the state of landed property among the Anglo-Saxons.

Partition of lands made by the Barbarians on their first establishment in the empire.

The Barbarians, who subverted the Roman empire on the Continent, had been long enough in habits of intercourse with the Provincials to know the value and estimate the advantages of private property in land. The laws of war which at that time prevailed gave them unlimited power over the lives and properties of the vanquished. There is no instance, however, where this right was carried to its full extent. Multitudes were reduced to slavery; but many retained their personal liberty. The estates of some individuals were subjected to total confiscation; but, in general, the Provincials were left in possession of part of their lands. When the conquerors finally settled in the territories they had subdued, the practice, which in most cases they adopted, was to make

a partition with the ancient proprietors of the lands and chattels possessed by the latter. A Barbarian was quartered on a Roman proprietor, and received from him a certain portion of his land, with the serfs and cattle necessary for its cultivation. To soften this act of spoliation the intruder was styled the guest of his victim, and some obligations of amity and protection were probably established between them. The distribution appears to have been made by lot; and as the first division was far from having exhausted the whole territory, fresh adventurers, when they arrived, were provided with possessions in a similar manner from lands that had not yet been divided. Such was the system adopted by the Burgundians in Gaul, by the Visigoths in Spain, and by the Ostrogoths in Italy. The Lombards alone, at their first settlement in Italy, instead of taking from the Roman proprietor a certain portion of his land, exacted from him a corresponding part of its produce.

In what manner the Franks distributed the lands they acquired by the conquest of Gaul, we have no distinct information. The plunder they obtained in the operations of war they divided by lot; but with respect to land, all we know with certainty is, that the Provincials were not entirely despoiled of their landed property. The existence of Roman proprietors is attested by the Salic law[1] (V).

The lands thus distributed were called alodial. They Alodial lands.

[1] Pact. Leg. Salic. Ant. t. 44. § 15. Reform. t. 43. § 7.

were transmissible by inheritance, held in absolute property, and exempt from all burthens and services to individuals. They are mentioned under various names in the laws and documents of the Barbarians, and seem to have been the universal and immediate result of their conquest and settlement in the empire (W).

It is probable that the shares of different persons were not equal; that the portion assigned to each was regulated, as it had been in the age of Tacitus[1], by his rank; that chiefs, who had numerous companions or retainers attached to their fortune, received larger allotments than others; and that the King or general of the army had the largest portion of all: but on this subject we have no positive or certain information.

Lands of the fisc or public.

After every warrior, entitled to a separate allotment and desirous of obtaining one, had been provided with an estate suitable to his condition, there remained a large portion of unappropriated land, which, according to the ancient notions of the Germans, belonged to the community. This unappropriated territory was called the land of the fisc or public, and was left, as in Germany, at the disposal of the state. Much of it, with mistaken piety, was lavished on the church. Portions of it were, from time to time, detached from the common stock, and converted into alodial property. Part of it was applied to the maintenance of the government and to the splendour

[1] De Mor. Germ. § 26. Agri—quos mox interse secundum dignationem partiuntur.

or hospitality of the court. Other parts of it were dealt out in temporary possessions to individuals, by whom it was held, with some rent or service annexed to it, not in property but in usufruct. Grants of this description were called benefices. The King, from his position and authority in the government, had necessarily a principal share in the distribution of this property, and as representative of the state, it was bestowed in his name, and said to be held of him. From the first origin of benefices they seem to have been granted for life; but they were often unjustly resumed, and they were at all times liable to forfeiture for misconduct. On the death of the possessor they reverted to the fisc; but from indulgence or convenience they were frequently continued to his children, and at length they were converted into hereditary possessions. When arrived at this stage of their progress, benefices or feuds, as they began to be called, differed from alodial property in no other respect than in the form of their tenure, and in the incidents, services, and burthens, to which they were subject. Beneficiary lands.

The great alodial proprietors followed the example of the fisc in granting benefices to their retainers, which were in like manner gradually transmuted into feuds or hereditary possessions, held by tenure of the lord or original proprietor of the estate.

The stipulations between the fisc or lord and the tenants who held benefices from them, were at first vague and indeterminate; but by degrees they became more fixed and precise, so that neither party could law-

fully exact from the other more than was contained in the compact or agreement entered into between them. The tenants engaged to pay certain rents or perform certain services to their lord; and the lord in return undertook to protect his tenants from their enemies, and to maintain them in the possessions he had conferred upon them.

Alodial lands converted into feuds or hereditary benefices.

During the ages of anarchy and disorder, that followed the conquests of the Barbarians, it was found, that the relation of lord and tenant afforded to the latter greater security for his person and property than he could obtain from the laws or government. To acquire this security with as little sacrifice as possible, the device was invented of alodial proprietors making a surrender of their estates to the crown or to some one able to protect them, on the condition of receiving back their lands as feuds or hereditary benefices, which, though burthened with rent or services, were thereby placed under the safeguard and protection of the lord to whom they had been nominally transferred. In consequence of the extension of this practice, alodial property gradually disappeared, and feudal tenures became nearly universal (X).

Denominations of land among the Anglo-Saxons.

The distribution of landed property in England by the Anglo-Saxons appears to have been regulated on the same principles that directed their brethren on the Continent. Part of the lands they acquired was converted into estates of inheritance for individuals; part remained the property of the public, and was left to the disposal of the state. The former was called *bocland*; the latter

I apprehend to have been that description of landed property, which was known by the name of *folcland.*

Folcland, as the word imports, was the land of the folk or people. It was the property of the community. It might be occupied in common, or possessed in severalty; and, in the latter case, it was probably parcelled out to individuals in the *folcgemot* or court of the district, and the grant attested by the freemen who were there present. But, while it continued to be folcland, it could not be alienated in perpetuity; and therefore, on the expiration of the term for which it had been granted, it reverted to the community, and was again distributed by the same authority [1]. Folcland.

Bocland was held by book or charter. It was land that had been severed by an act of government from the folcland, and converted into an estate of perpetual inheritance. It might belong to the church, to the King, or to a subject. It might be alienable and devisable at the will of the proprietor. It might be limited in its descent, without any power of alienation in the possessor. It was often granted for a single life or for more lives than one, with remainder in perpetuity to the church. It was forfeited for various delinquencies to the state (Y). Bocland.

[1] Spelman describes folcland as terra popularis, quæ jure communi possidetur—sine scripto (Gloss. Folcland). In another place he distinguishes it accurately from bocland. Prædia Saxones duplici titulo possidebant: Vel scripti authoritate, quod bocland vocabunt—vel populi testimonio, quod folcland dixere (Ib. Bocland).

Estates in perpetuity were usually created by charter after the introduction of writing, and on that account bocland and land of inheritance are often used as synonymous expressions. But at an earlier period they were conferred by the delivery of a staff, a spear, an arrow, a drinking horn, the branch of a tree, or a piece of turf; and when the donation was in favour of the church, these symbolical representations of the grant were deposited with solemnity on the altar; nor was this practice entirely laid aside after the introduction of title-deeds. There are instances of it as late as the time of the Conqueror[1]. It is not therefore quite correct to say, that all the lands of the Anglo-Saxons were either folcland or bocland. When land was granted in perpetuity it ceased to be folcland; but it could not with propriety be termed bocland, unless it was conveyed by a written instrument.

Folcland exempted from many burthens when converted into bocland.

Folcland was subject to many burthens and exactions from which bocland was exempt. The possessors of folcland were bound to assist in the reparation of royal vills and in other public works. They were liable to have travellers and others quartered on them for subsistence. They were required to give hospitality to Kings and great men in their progresses through the country, to furnish them with carriages and relays of horses, and to extend the same assistance to their messengers, followers, and servants, and even to the persons who had

[1] Hickes, Diss. Epist. 79—85.

charge of their hawks, horses, and hounds. Such at least are the burthens, from which lands are liberated, when converted by charter into bocland.

Burthens to which bocland was subjected.

Bocland was liable to none of these exactions. It was released from all services to the public, with the exception of contributing to military expeditions, and to the reparation of castles and bridges. These duties or services were comprised in the phrase of trinoda necessitas, which were said to be incumbent on all persons, so that none could be excused from them. The church indeed contrived, in some cases, to obtain an exemption from them; but, in general, its lands, like those of others, were subject to them. Some of the charters, granting to the possessions of the church an exemption from all services whatever, are genuine; but the greater part of them are forgeries.

Bocland might nevertheless be subjected to the payment of an annual rent to the state by its original charter of creation. We have an instance of this among the deeds of Worcester cathedral collected by Heming. Æthelbald, King of the Mercians, had, it appears, granted to Eanulf, grandfather of Offa, an estate of inheritance, burthened with an annual payment of ale, corn, cattle, and other provisions to a royal vill; and this estate, with the rent charge attached to it, Offa afterwards gave in remainder to the see of Worcester after his own life and that of his sons [1].

[1] Heming, 101.

Folcland possessed by freemen of all ranks and conditions;

Folcland might be held by freemen of all ranks and conditions. It is a mistake to imagine with Lambard, Spelman, and a host of antiquaries, that it was possessed by the common people only. Still less is Blackstone to be credited, when, trusting to Somner, he tells us it was land held in villenage by people in a state of downright servitude, belonging, both they and their children and effects, to the lord of the soil, like the rest of the cattle or stock upon the land [1]. A deed published by Lye exposes the error of these representations [2]. Alfred, a nobleman of the highest rank, possessed of great estates in bocland, beseeches King Alfred in his will to continue his folcland to his son Æthelwald; and if that favour cannot be obtained, he bequeaths in lieu of it to his son, who appears to have been illegitimate, ten hides of bocland at one place, or seven hides at another. From this document it follows, first, that folcland was held by persons of rank; secondly, that an estate of folcland was of such value that seven or even ten hides of bocland were not considered as more than equivalent for it; and, lastly, that it was a life estate, not devisable by will, but, in the opinion of the testator, at the disposal of the King, when by his own death it was vacated.

by noblemen of the first rank;

It appears also from this document, that the same person might hold estates both in bocland and in folcland. That is to say, he might possess an estate of inheritance,

[1] Blackstone, ii. 92.

[2] Lye's Anglo Saxon Dictionary, Appendix, ii. 2.

of which he had the complete disposal, unless in so far as it was limited by settlement; and with it he might possess an estate for life, revertible to the public after his decease. In the latter times of the Anglo-Saxon government, it is probable there were few persons of condition, who had not estates of both descriptions. Every one was desirous to have grants of folcland, and to convert as much of it as possible into bocland. Money was given and favour exhausted for that purpose.

In many Saxon wills we find petitions similar to that of Alfred; but in none of them that I have seen is the character of the land, which could not be disposed of without consent of the King, described with the same precision. In some wills, the testator bequeaths his land as he pleases, without asking leave of any one[1]; in others, he earnestly beseeches the King that his will may stand, and then declares his intentions with respect to the distribution of his property[2]; and in one instance he makes an absolute bequest of the greater part of his lands, but solicits the King's consent to the disposal of a small part of his estate[3]. There can be no doubt that bocland was devisable by will, unless where its descent had been determined by settlement: and a presumption therefore arises, that where the consent of the King was necessary, the land devised was not bocland but folcland. If this inference be

[1] Somner's Gavelkynd, 88. 211. Hickes, Pref. xxxii. Diss. Epist. 29. 54, 55. 59. Madox, Formul. 395.

[2] Lambard, Kent, 540. Hickes, Diss. Epist. 54. Gale, i. 457. Lye's Append. ii. l. 5. Heming, 40. [3] Hickes, Diss. Epist. 62.

admitted, the case of Alfred will not be a solitary instance, but common to many of the principal Saxon nobility.

and by thegns or military servants of the state.

That folclands were assigned to the thegns, or military servants of the state, as the stipend or reward for their services, is clearly indicated in the celebrated letter of Bede to Archbishop Egbert [1]. In that performance, which throws so much light on the internal state of Northumberland, the venerable author complains of the improvident grants to monasteries, which had impoverished the government, and left no lands for the soldiers and retainers of the secular authorities, on whom the defence of the country must necessarily depend. He laments this mistaken prodigality, and expresses his fears that there will be soon a deficiency of military men to repel invasion; no place being left where they can obtain possessions to maintain them suitably to their condition. It is evident from these complaints, that the lands so lavishly bestowed on the church, had been formerly the property of the public and at the disposal of the government. If they had been boclands, it could have made no difference to the state, whether they belonged to the church or to individuals, since in both cases they were beyond its control, and in both cases were subject to the usual obligations of military service. But, if they formed part of the folcland, or property of the public, it is easy to conceive how their conversion into bocland must have weakened the state, by lessening

[1] Smith's Bede, 305. 312.

the fund out of which its military servants were to be provided.

Some of the monasteries described by Bede were institutions of a singular nature. They had the privileges of ecclesiastical foundations, but were governed by laymen, and were inheritable and devisable like other estates in bocland. They were common in Mercia [1], as well as in Northumberland; and appear to have been devices of avarice and ambition for obtaining possessions in bocland on false pretences. To this fraudulent subduction of national property from the purposes of military defence to which it had been destined, may in some measure be attributed the success of the Danish invasions, which in the northern and central parts of England had little resistance to encounter.

A charter of the eighth century conveys to the see of Rochester certain lands on the Medway, as they had been formerly possessed by the chiefs and companions of the Kentish Kings [2]. In this instance folcland, which had been appropriated to the military service of the state, appears to have been converted into bocland and given to the church.

The gesiths, gesithmen, or gesithcundmen, were the military companions or followers of the Anglo-Saxon chiefs and Kings. That this is the true sense of the word, appears from many passages in King Alfred's translation of Bede [3].

[1] Hickes, Gram. Anglo-Sax. 170. Smith's Bede, 767. 786. Heming, 218.

[2] Text. Roffens. 72. Hearne's edition.

[3] Alfred's Bede, iii. 14. 22.; iv. 4. 10. 22.; v. 4, 5.

Some of these gesiths had lands; others had not[1]. The lands they held were, in some cases at least, not their own[2]. When companions of the King, that is, servants of the state, the lands they possessed were probably folcland. In the latter periods of the Anglo-Saxon history, the appellation of gesiths fell into disuse, and appears to have been superseded by that of thegn. The gesiths were the same with the Leudes of the Franks and Visigoths, and both were derived from the *comites* of the ancient Germans. It would seem that the comites of the King had the designation of thegn, before it was given to the comites of inferior chiefs[3].

Bocland possessed by freemen of all ranks and degrees:

Bocland also might be held by freemen of all ranks and degrees.

by ceorls,

A ceorl might possess bocland and perform for it military service to the state. If he had five hides of bocland with the other requisites demanded by law, he was entitled to the privileges of a thegn[4].

by gesiths,

Gesiths might receive grants of bocland[5].

by thegns,

Thegns might also possess bocland[6]. But the estate of a thegn in bocland must not be confounded with the thegn lands which he held, by a beneficiary tenure, from the King or from a private lord, for military service. Thegn lands from the King or state are repeatedly mentioned in Domesday; and the Saxon laws carefully dis-

[1] In. 45. 51. [2] In. 63, 64, 65, 66. 68. [3] In. 45.

[4] Wilkin's Leg. Anglo-Sax. 70, 71.

[5] Hickes, Gram. Anglo-Sax. 139. Smith's Bede, 786.

[6] Edg. E. 2. Cn. E. 11.

tinguish the bocland possessed by a thegn, from the land given him by his hlaford [1]. It is probable that thegn lands were originally granted for life, as beneficiary lands were on the continent; but before the end of the Saxon period, the possessions given to a man by his hlaford descended, in certain cases, to his children [2].

The estates of the higher nobility consisted chiefly of bocland. Bishops and abbots might have bocland of their own, in addition to what they held in right of the church.

by the higher nobility.

The Anglo-Saxon Kings had private estates of bocland; and these estates did not merge in the crown, but were devisable by will, gift, or sale, and transmissible by inheritance in the same manner as bocland held by a subject.

Anglo-Saxon Kings possessed of bocland which did not merge in the crown.

Offa, King of the Mercians, had 110 cassates of land in Kent converted into bocland for himself and his heirs; with remainder to the church. These lands did not descend, after the death of his son Ecgferth, to Cynwulf, his successor in the Mercian throne, but to Cynedritha, abbess of Cotham. Other lands, of which he had possessed himself without a legal title, went also to Cynedritha and not to his successors in Mercia [3].

Cynwulf of Mercia, after the untimely fate of his son, was succeeded in that kingdom by Ceolwulf and Beornwulf; but his private property was inherited by his daughter Cwænthrith. In a council held at Clofeshoc

[1] Cn. P. 75. [2] Ib. ib. [3] Wilkins, Conc. i. 163.

under Beornwulf, she is styled the daughter and heiress of Cynwulf[1].

We are told that Ethelwulf, King of the West Saxons, made a will after his return from Rome, by which he distributed among his children, kinsmen, and nobles, the whole of his private estate both in land and money[2].

But the most decisive and circumstantial proof that the Anglo-Saxon Kings had private property in land, and possessed it with the same rights as other persons, is derived from the will of King Alfred, which is still extant[3]. From this document it appears, that Egbert, grandfather of Alfred, had settled his landed property on his male in preference to his female heirs; that Ethelwulf, father of Alfred, had bequeathed various estates to his younger children, and regulated, in certain contingencies, how they should descend; that Alfred himself and two of his brothers had acquired landed property, in addition to the inheritance they received from their father; that their rights over their estates were settled and adjudged in the courts of law, as if they had been private individuals; and lastly, that Alfred was empowered to make a new settlement of his lands by a decision of the witan in these words, "It is now all thine "own; bequeath it, give it, or sell it to kinsman or "stranger, as it pleaseth thee best."

[1] Wilkins, Conc. i. 172. 174. [2] Flor. Wigorn. in 855.
[3] Published at Oxford in 1788.

When bocland was created, the proprietor, unless fettered by the original grant, or by a subsequent settlement of the estate, appears to have had an unlimited power to dispose of it as he chose[1]. In the exercise of that power he might transfer it by grant or bequeath it by will, in such quantities, for such periods and on such conditions as he was pleased to appoint. If conveyed by a written instrument, whatever might be the stipulations annexed to the grant, the land was still denominated bocland[2]. It was in consequence of this use of the term that we find estates of very different descriptions classed together under the name of bocland. When once severed from the folcland or property of the community, an estate retained the name of bocland, whatever were the burthens and services imposed on it, provided it was alienated by deed. When transferred in a different manner, though held on the same conditions, it seems to have been called *lænland*. This appears from a transaction recorded in the chartulary of Worcester[3]. We are there told, that Archbishop Oswald granted to Ælfsige a tenement in Worcester with the croft attached to it, for three lives, to be held as amply in the form of bocland as it had been held before in the form of lænland. Lænland might be an estate for life or it might be held at will;

Bocland at the disposal of the proprietor, unless limited by settlement.

[1] Somner's Gavelkynd, 88, 89.

[2] Heming, 129. 140, 141. 180. 182. 195. 206. Smith's Bede, 769. 771.

[3] Heming, 158. See also ib. 204, 205.

and if the possessor was convicted of felony, it reverted to the donor[1] (Z).

Consequences of that power.

Bocland, when alienated by grant or will, might be free, or in the seignory of some church, manor, or individual[2]. It might be subjected to payments in kind or in money[3]. It might be liable to services, free, servile or mixed[4]. It might be granted on the condition that the possessor discharged the military or other services due by the proprietor to the state[5]. It might be let for annual rent or for the performance of menial offices[6]. It might be held for lives or at will[7]; for services certain or indefinite, or with no reservation of services whatever[8].

[1] Hickes, Diss. Ep. 58, 59. Text. Roff. 115, 116. Heming, 94, MS. Ch. Ch. Cant.

[2] Hickes, Diss. Ep. 62. Heming, 96. 384. Somner, Gavelkynd, 205, 206. Smith's Bede, 782. Numerous entries in Domesday distinguish lands, which in Saxon times must have been bocland, into free lands and lands in seignory. See i. 72, a 2; 80, a 1; 84, b 2, &c., and 77, b 22; 120, a 1; 176, b 2, &c.

[3] Hickes, Diss. Ep. 10. 55. Gram. Anglo-Sax. 140. 142. Lye, Dict. Anglo-Sax. App. ii. 1, 2, 3. 5. Lambard's Kent, 543. Smith's Bede, 774. Heming, 118. 144. 191. Somner's Gavelkynd, 14. 214. Gale, i. 504, &c.

[4] Heming, 134. 184. 189. 292. Domesday, i. 269, b.

[5] Heming, 81. 96. 232. 265. Smith's Bede, 773. 778, 779, 780.

[6] Heming, 264. 267. 230.

[7] Smith's Bede, 770, &c. Lye, App. ii. 1. Lambard's Kent, 544. Madox, Formul. Diss. xxi. Somner's Gavelk. 14. Heming, passim. Hickes, Diss. Ep. 62. Gram. 140. 142. 174. Gale, i. 407. 417. 459.

[8] Madox, Form. 135. Hickes, Gram. 141. Smith's Bede, 779.

Tenants of bocland might be persons of the same description with the lowest and most dependant of the occupiers of folcland. The only difference between them seems to have been, that the one held their lands directly from the public authorities of the state, while the others held their land of some proprietor, to whom it had been previously granted as a private inheritance. The villein of latter times and the copyholder of the present day are not derived from the one more than from the other.

Bocland might be forfeited for various offences, and when forfeited, it escheated to the King as representative of the state[1]. Land held of a subject, when forfeited for the same delinquency, escheated to the lord[2]. When bocland was granted on lives, it was usual to insert a clause in the charter, declaring that whatever offence the tenant might commit, his land should revert without forfeiture to the grantor[3]. This precaution, however, was not always successful. The chartulary of Worcester complains, that certain tenants of the see had been deprived of their lands, and the church defrauded of its reversion in consequence of their failure to discharge, when due, a general tribute imposed on the kingdom[4].

From the view that has been taken of the distinction between folcland and bocland, it follows, that the folc-

Folcland was the fund from which bocland was created.

[1] Æthelr. 2. Cn. P. 12. 75. Text. Roff. 44. 136. Hickes, Diss. Ep. 114. Gale, i. 484. 488.

[2] Cn. P. 75. Jud. Civ. Lund. apud Wilk. 65.

[3] Heming, 96. 126. 128. 131. 146. 161. 184. 190. 201, 202. 217, &c. Monast. iii. 37, New Ed.

[4] Heming, 278.

land, or land of the community, like the fisc of the continental nations, was the fund out of which the boclands, alodial possessions or estates of inheritance, were carved. At what time the folcland, or land of the public, began to be converted into bocland, we are not informed. It was probably soon after the establishment of the Saxons in England; for, though a more rude and uncultivated people than the nations, which had enjoyed greater opportunities of intercourse with the Romans, they must have found private property in land among the Britons, whom they expelled or subdued, and could not long remain insensible to the advantages arising from it. Certain it is, that in one of the earliest charters giving land to the church, it is implied, though not expressly asserted in the grant, that the land contained in the donation had been previously the private property of the donor[1]. But, though commenced at an early period, the conversion of folcland into bocland seems to have been slowly and gradually effected. Every charter

[1] Ego Hoditredus, parens Sebbi, provincia East Sexanorum, cum ipsius consensu, propria voluntate, sana mente, integroque consilio, tibi Hedeluncæ abbatissæ, ad augmentum monasterii tui, quæ dicitur Beddanham, perpetualiter trado et de meo jure in tuo transcribo terram quæ appellatur Ricingaham, &c. Smith's Bede, 748. Sebbi was one of the Kings of the East Saxons between 665 and 694. The necessity for the King's consent occasions the only doubt in the interpretation of this deed. Hodilred may have had only a life estate in the land, when he transferred it to the monastery and, with the King's consent, converted it into an estate in perpetuity.

creating bocland is a proof, that the land had formerly been folcland. A charter of Archbishop Wilfred, who died about 830, asserts in direct terms, that the land, which he gives away, had never been any man's bocland before it became his, and appeals to general practice, whether a proprietor of bocland might not sell it or dispose of it as he pleased[1]. In a charter of Burhred, King of the Mercians, the land he grants to an individual, is said to have been the property of the kingdom before the donation was made[2].

Folcland converted into bocland by public authority.

Folcland being the property of the community, could not be converted into bocland except by an act of government. In early times this was probably done in the gemot or public assembly of the tribe, as temporary allotments to individuals were made in the gemot or assembly of the district. But, when the King came to be considered as the representative of the state, all charters of bocland ran in his name, and appeared to emanate from his bounty. The power of creating alodial property, by which was meant an estate of inheritance, is enumerated in the Textus Roffensis among the prerogatives of the crown[3]. But, though bocland could not be created without the authority

[1] Somner's Gavelkynd, 88.

[2] Ego Burgred, cum consensu et consilio seniorum meorum, liberti animo concedens, donabo aliquam partem agri regni mei. Smith's Bede, 770. Burhred was King of the Mercians from 852 to 874.

[3] Istæ sunt consuetudines regum inter Anglos-Carta alodii in æternam hæreditatem. Text. Roff. Cap. 27, p. 44.

of the King, it was not in his power to convert folcland into bocland without the consent of his witan—principes —seniores—optimates—magnates—or other persons, by whatever name they were called, who assisted him in the administration of his kingdom. There is hardly a Saxon charter creating bocland, which is not said to have been granted by the King with consent and leave of his nobles and great men. If that consent was withheld, his grants were invalid. In the proceedings of a council held at Kingston upon Thames, by Egbert, we are told, that his predecessor, Baldred, King of the Kentishmen, had given to Christ Church, Canterbury, the manor of Mallings in Sussex; but that prince, it is added, having offended his nobles, they refused to ratify his grant, which had therefore remained without effect[1]. In conveyances of bocland on lives, the consent of the King or of the superior lord is oftentimes mentioned by the proprietor, but is frequently omitted.

When the King became the representative of the state, the folcland, or land of the public, began to be called and considered his property. It was his land in the same sense that the servants of the public were his servants, the laws his laws, and the army his army. In his politic or ideal capacity he was the state, and whatever belonged to the state belonged to him. If folcland was assigned to any one for life or for a shorter term, it was given by his authority and apparently for his

[1] Wilkins, Conc. i. 178. Somner's Gavelkynd, 114.

service. When it was converted by charter into bocland, or land of inheritance, the deed was executed in his name, and though the grant was of no validity without the concurrence of his witan, the donation seemed in form the spontaneous act of his munificence. While it continued folcland, it was subject to payments and other burthens, which were due to him, or to persons who were termed in law his servants. When bestowed on military men, employed in the national defence, it was called thegn land, and said to be held by his thegns. When applied to the service of the persons intrusted with the civil administration of the shires and hundreds, it was called reveland, and said to be possessed by his ealderman and gerefan. When appropriated to his own subsistence, to the maintenance of his household, and to the splendour of his court, it was said to be held in demesne or to be let out to farm. The same lands, it is probable, were constantly or usually destined to the same use and occupied by persons of the same degree (AA).

Appropriations of folcland to particular uses.

The appropriation of particular lands to the King's table, and to the expense of his household, most probably took place at a very early period. As representative of the state, one of the duties attached to his station, was the exercise of hospitality to those who counselled and assisted him in the administration of his kingdom. It was not unnatural there should be lands specially destined for that purpose, and as these increased in number and value, it is probable that the dues from other folclands to the state were diminished or less rigidly exacted. A

law of Canute[1] illustrates the progress of this change. Desirous, as he says, to lighten the burthens of his people, he directs his gerefan to cultivate his lands with care and from thence to supply him with necessaries, forbidding them to take provisions from any one for his use without the consent of the owner. This is the first allusion I have seen to the right of purveyance, a prerogative that was afterwards so scandalously abused. In its origin it was probably derived from the dues reserved to the state in the allotments of folcland to individuals.

From these appropriations of the public lands to the King, as representative of the state, the word folcland fell into disuse, and gave place to the term of Terra Regis or crown land. Antiquaries, inattentive to this change of language, have bewildered themselves among copyholds and commons in search of the folcland of their ancestors.

Sources from which the Terra Regis of Domesday was derived.

The Terra Regis of Domesday was derived from a variety of sources. It consisted in part of land that happened at the time of the survey to be in the King's hands by escheats or forfeitures from his Norman followers. It was constituted in part of the lands of Saxon proprietors, which had been confiscated after the Conquest and had not been granted away to subjects. But it was chiefly composed of land that had been possessed by the Confessor in demesne, or in farm, or had been held by

[1] Cn. P. 67.

his thegns and other servants[1]. Of the last description part was probably the private bocland of the Confessor, which had belonged to him as his private inheritance. But, if we compare the number of manors assigned to him as his demesne lands in Domesday with the estates of bocland possessed by Alfred, it seems incredible that the whole should have been his private property. A great part must have been the folcland or public property of the state, of which, though the nominal proprietor, he was only the usufructuary possessor, and, with the licence and consent of his witan, the distributor on the part of the public. The land which is called Terra Regis in the Exchequer Domesday, is termed in the original returns of the Exon Domesday, demesne land of the King belonging to the kingdom[2]. In the Exchequer Domesday itself a similar form of expression is to be found. A particular manor is said to have formerly belonged to the kingdom, but to have been since granted to Earl Ralph by the King[3].

We have seen that the private bocland of the King was distinct from the folcland or public property of the

Private lands of the King merged in the crown.

[1] It is difficult to conceive how Lord Lyttleton could have been so careless as to assert that all the demesne lands assigned to the crown in Domesday had belonged to it in the time of Edward the Confessor (Henry II. iii. 238. 3d ed.). The slightest examination of Domesday must have shown him the contrary.

[2] Dominicatus Regis ad regnum pertinens in Devenescira. Exon Domesday, p. 75.

[3] 2 Domesday, 119 b.

state, that it descended to his natural heirs and not to his successors in the kingdom, and that it was devisable by will like the land of a subject. That this distinction should be preserved to a late period among the Anglo-Saxons is not surprising, when it is considered, that in their government royalty was elective, and though their Kings were usually chosen from the same family, that the nearest of blood to the deceased monarch was often passed by or postponed, while a more distant relative was preferred. If the private estate of the King had merged in the crown, it must in such cases have gone to his successor, to the prejudice of his heirs; and to prevent that injustice, it was necessary to keep them separate. Nor was the distinction confined to land. It extended also to personal property. If the King was slain, a heavy composition was exacted for him, one half of which went to his family, and the other half to his people as a compensation for his loss[1].

But this distinction between the private patrimony of the King and the public property of the state was at length obliterated. When the folclands of the community, that had not been converted into private inheritance, acquired the character and appellation of crown lands, these two species of property were entirely confounded[2]. It became a maxim of English law, that

[1] Wilkins, Leg. Anglo-Saxon, p. 64. 72.

[2] To such an extent was this confusion carried that Spelman, writing in the early part of the 17th century, expresses himself thus: Fiscus demum omnes principis facultates respicit,

all lands and tenements possessed by the King, belong to him in right of his crown and descend with it to his successor, though he had been seised of them in his private capacity before he was King, and had inherited them from ancestors, who were never invested with the attributes of royalty[1]. By the adoption of this principle the King was restrained from making bequests of landed property by will; but he still retained the power of giving away the lands of the crown in his lifetime[2], and from erroneous notions of his right to these lands, he was allowed to dispose of them by patent without the advice and consent of his great council. How much that power was abused it is needless to say. The rapacity of favourites and prodigality of the court led parliament frequently to interpose, and at length an effectual, though tardy, remedy for the evil was accomplished by the statute of Queen Anne[3]. The little that remained of the ancient possessions of the state was secured from further dilapidation, and by a singular revolution of policy there was a recurrence in the late reign to the ancient policy of the Anglo-Saxons. The crown lands were virtually restored to the public[4], while the King obtained the right of

Scaccarium dictus, nulla pene jam nobiscum habita pecuniæ publicæ et privatæ distinctione, cum sit utraque in solius principis arbitrio. Glossary, Fiscus.

[1] Comyn, Digest. Prærogative, D. 64.

[2] Ibid. D. 88. [3] 1 Ann. St. 1. c. 7.

[4] By 1 Geo. III. c. 1. and subsequent acts.

acquiring landed property by purchase, and of bequeathing it by will like a private person[1].

CONCLUSION.

If there be truth in the preceding observations, the practice of our constitution has at no time corresponded with the monarchical theory of modern Europe. Every one has read with disgust the indecent attempts of churchmen to impress a character of divinity on Kings, to inculcate on their subjects the obligations of passive obedience and non-resistance as religious duties, to found their title on a delegation from heaven, and with impious flattery to exalt them above the Almighty, by maintaining, that the "most high, sacred, and transcendent" of relations is the "relation between King and subject[2]." Every one has heard of the distinction made by judges and lawyers, in the times of the Tudors and Stuarts, between the ordinary and extraordinary or absolute, as they were pleased to call it, prerogative of the crown. Every one knows the abuses introduced into our government under pretence of the sovereign power attributed in law books to the King of England. And every one must admire the resolution and firmness of our ancestors in combating and successfully resisting these pernicious

[1] By 39 & 40 Geo. III. c. 88.

[2] Brodie, British Empire, ii. 136.

doctrines. When the lords tacked to the Petition of Right a clause subversive of its object; when they proposed as an addition to that celebrated statute a declaration, that it was tendered to his Majesty "with due "regard to leave entire that sovereign power with which "he was intrusted for the protection, safety, and hap-"piness of his people;" Sir Thomas Wentworth, afterwards Earl of Strafford, replied, "If we admit of this "addition, we shall leave the subject worse than we "found him. Let us leave all power to his Majesty to "punish malefactors; but these laws[1] are not acquainted "with sovereign power." "Prerogative," observes Sir Edward Coke, "is part of the law; but sovereign power "is no parliamentary word. Magna Charta and all "our statutes are absolute, without any saving of "sovereign power. Let us take heed what we yield "unto. Magna Charta is such a fellow that he will have "no sovereign." "I know how to add sovereign to the "King's person," exclaimed Mr. Pym, "but not to his "power. We cannot *leave* to him a sovereign power; "for he was never possessed of it[2]." "Let us leave to "the King," said Mr. Alford, "what the law gives to

[1] i. e. The laws confirmed by the Petition of Right.

[2] I have ventured in the extract from Mr. Pym's speech to substitute the words *he was* for *we were*. The sense requires it, and Mr. Glanvil's argument in the name of the commons justifies the alteration (Rushworth, i. 573.). The typographical errors in the printed edition of Rushworth are innumerable.

" him and nothing more[1]." It is needless to add, that, after many shifts, subterfuges, and menaces, the King was compelled to return his reluctant answer to the Petition of Right, " Soit droit fait come il est desiré;" nor is it necessary to remind our readers, that no sooner was the parliament dissolved than the provisions of the act were disregarded and shamelessly violated by his orders.

In modern times the prerogative of the crown has been so strictly defined by law, and since the Revolution there has been fortunately a succession of Princes so little disposed to contend for an illegal extension of its boundaries, that though the old doctrines of absolute sovereignty and transcendent dominion still disfigure our law books, they are little heard of elsewhere. Occasionally however, it happens, that in parliamentary discussions, assertions are hazarded of latent prerogatives in the crown, which are supposed to be inherent in the very nature of sovereignty. That such pretensions are unfounded, it is not difficult to make out. Every government that is not established by military force, or founded on the express consent of the people, must derive its authority from positive law or from long continued usage. But, where law confers any power, it prescribes and directs the mode of administering the authority it bestows; and what has been given by usage is necessarily regulated by usage in its exercise. A prerogative founded on usage, which cannot be enforced because it has fallen

[1] Rushworth, i. 561, 562.

into desuetude, is a contradiction in terms. No one will pretend, that any prerogative of the King of England is founded either on military force or on the express consent of the people. Every prerogative of the crown must, therefore, be derived from statute or from prescription, and in either case there must be a legal and established mode of exercising it. Where no such mode can be pointed out, we may be assured that the prerogative so boldly claimed is derived neither from law nor usage, but founded on a theory of monarchy, imported from abroad, subversive of law and liberty, and alien to the spirit as well as to the practice of our constitution. In England there are no latent powers of government, but those possessed by the supreme and sovereign authority of the state. The King is our sovereign lord; but he does not possess the sovereign authority of the commonwealth, which is vested, not in the King singly, but in the King, Lords, and Commons jointly. When we hear of a prerogative inherent in the crown, which the King has no legal means of exercising, we may be certain that it has no existence but in speculative notions of government. Emergencies may arise, where it is necessary for the safety of the state to commit additional powers to the persons intrusted with its defence. But when such cases occur, we are to be guided by considerations of reason and expediency in the powers we confer, and not by vain and empty theories of prerogative, which the very act we are called upon to perform proves to be futile and unfounded.

AUTHORITIES AND ILLUSTRATIONS.

AUTHORITIES AND ILLUSTRATIONS.

(A.)—Page 12.

THERE were Kings in many of the German tribes[1]; but their power was not unlimited or arbitrary[2]. If they directed the councils of their nation, it was auctoritate suadendi magis quàm jubendi potestate[3]. The Eburones, a German tribe between the Meuse and the Rhine, were governed by Ambiorix and Cativulcus[4]. Having taken up arms against the Romans, Ambiorix, who had received many favours from Cæsar, stated in excuse for his defection, "sua esse ejusmodi imperia, ut non minus haberet juris in se multitudo quam ipse in multitudinem[5]." Generally speaking, the name of King was odious to the Germans[6]; and notwithstanding the services Arminius had rendered his countrymen, they put him to death for affecting that dignity[7]. In the tribes governed by Kings there was less freedom than in the other states, and in one of them so great was the jealousy of power, that the people were not intrusted with the possession of arms[8]. With the prejudices natural to a

[1] Tacitus de Mor. Germ. 7. 10, 11, 12. 25. &c.

[2] Ib. 7. nec regibus infinita aut libera potestas.

[3] Ib. 11. [4] Cæsar de Bell. Gall. v. 24. [5] Ib. v. 27.

[6] Tacitus, Annal. ii. 44. nomen regis invisum.

[7] Ib. ii. 88. regnum affectans.

[8] Tacit. de Mor. Germ. 43, 44.

Roman, Tacitus expresses himself contemptuously of the tribes subject to Kings, as inferior to the rest of their countrymen[1]. He has neglected to inform us how many of the German communities were under that form of government. Those he mentions are the Marcomanni and Quadi, on the north bank of the Danube; the Gothones, Rugii, and Lemovii near the Baltic; and the Suiones and Sitones in Scandinavia[2]. The younger Pliny adds the Bructeri, in the west of Germany, who had a King imposed on them by the Romans in the time of Trajan[3]. When the Franks compiled their Salic law they were governed, not by Kings, but by chiefs or proceres, who seem to have been numerous[4]. Kings of the Franks are mentioned at an earlier period by the Augustan historians; but from the prologue to the Salic law it is probable, that the persons called Kings by the Romans, were merely chiefs or generals of the different tribes that composed the Frank confederation.

(B.)—Page 12.

The form of government in the German tribes has been described by Cæsar and Tacitus. "In pace," says the former[5], "nullus est communis magistratus; sed principes regionum et pagorum inter suos jus dicunt controversiasque minuunt." The account given by Tacitus[6]

[1] Tacit. de Mor. Germ. 25. 42, 43, 44, 45. [2] Ib. 42, 43, 44, 45.
[3] Plin. Ep. ii. 7. [4] Proleg. ad pact. leg. Salic. Antiq.
[5] De Bell. Gall. vi. 23. [6] De Mor. German. 11, 12.

is more circumstantial. " De minoribus rebus principes consultant, de majoribus omnes, ita tamen, ut ea quoque quorum penes plebem arbitrium est, apud principes pertractentur. Considunt armati. Rex vel princeps, prout ætas cuique, prout nobilitas, prout decus bellorum, prout facundia est, audiuntur, auctoritate suadendi magis quam jubendi potestate. Si displicuit sententia, fremitu aspernantur; sin placuit, frameas concutiunt. Licet apud concilium [1] accusare quoque et discrimen capitis intendere. Eliguntur in iisdem conciliis et principes, qui jura per pagos vicosque reddunt. Centeni singulis ex plebe comites, consilium simul et auctoritas, adsunt."

(C.)—Page 12.

" Quum bellum civitas aut inlatum defendit aut infert, magistratus, qui in bello præsint, ut vitæ necisque habeant potestatem, deliguntur [2]." Tacitus [3] confirms this account, " Duces ex virtute sumunt;" but he represents the authority of these temporary generals as extremely limited: " Duces exemplo potius quam imperio, si prompti, si conspicui, si ante aciem agant, admiratione præsunt. Cæterum neque animadvertere, neque vincire, neque verberare quidem, nisi sacerdotibus permissum; non quasi in pœnam nec ducis jussu, sed velut Deo inspirante, quem adesse bellatoribus credunt." When ap-

[1] The popular assembly, which Tacitus calls concilium, was termed by the Franks mallum or *mahl;* by the Scandinavians, *thing*, and by the Anglo-Saxons *gemot.*

[2] Cæsar de Bell. Gall. vi. 23. [3] De Mor. Germ. 7.

pointed, the general was elevated on a buckler, and exhibited to the surrounding multitude—" impositus scuto, more gentis, et sustinentium humeris vibratus, dux deligitur [1]." The same ceremony was used in after times by the Franks, when they made choice of a King; and there is still in England a vestige of this ancient custom, in the practice of *chairing* members of parliament.

At the close of the seventh century, the continental Saxons were still unacquainted with the government of Kings. They were divided into tribes, and their territory into districts [2], and these last were subdivided into townships [3]. In every district there was a chief or *ealdorman*, and under him, in every township, a *tungerefa* or townreeve. In time of peace none of the ealdormen had authority over the others; but on the breaking out of a war, they met and determined by lot which of them should have the command of the national forces. While the war lasted, the person thus designated was obeyed as *heretoga* or general of the army. On the return of peace his authority ceased, and all reverted to their former equality [4].

In conformity to this account we find the leaders who conducted the Jutes and Saxons into Britain in the fifth century, described as heretogan or ealdormen. It was not for some time after their arrival that they assumed the appellation of Kings [5]. In Northumberland the Angles

[1] Tacit. Hist. iv. 15.
[2] Mægthas—pagi.
[3] Tunscipas—vici.
[4] Bed. Hist. Eccl. v. 10.
[5] Bed. Hist. Eccl. i. 15. Sax. Chron. in 449. 495.

carried on war with the natives for near a century before they had a King to govern them, and in East Anglia and Mercia they were established for many years in the country without any chief magistrate or common head [1].

About 170 years after the arrival of the West Saxons in England, they revived for a short time the old Germanic constitution of their forefathers. On the death of Cenwalh in 672, we are told by Bede [2], that the government of the West Saxons was divided among a number of petty Kings or ealdormen, as they are termed by his translator Alfred. This form of government is said to have lasted about ten years. At the end of that period it was subverted by Ceadwalla, who overcame and expelled these chiefs and became sole monarch of the West Saxons. In the interval there appear to have been temporary Kings or generals, created for the conduct of foreign wars [3].

A similar occurrence took place among the Lombards, soon after their occupation of the north of Italy. On the death of Clephis, their second King, instead of electing another King, they divided the territory they had subdued into thirty-five districts, with a chief or dux, as he is called, presiding over each; and this plan of government is also said to have continued for ten years [4]. "The whole affair," says Savigny [5], "is commonly said

[1] Malmesb. Hunt. Westm. [2] Hist. Eccl. iv. 12.

[3] Sax. Chron. in 674. 676. 685. Lingard, 1. 189. 8vo.

[4] Paul. Diacon. l. 2. c. 32.

[5] Roman Law during the Middle Ages, i. 264.

" to have been a revolutionary usurpation; but, with " much more reason, it may be viewed as a temporary " return to the oldest constitutional practice of the " nation."

(D.)—Page 12.

Soon after the Franks obtained possessions in the country south of the Rhine, they substituted permanent chiefs with the title of King, in place of the ancient leaders of their army, who, like the generals of the Saxons, had probably only a temporary command. This event took place about the beginning of the fifth century. Authors are not agreed as to the name of their first King. Gregory of Tours and his epitomiser Fredegaire, make Theodomir the first of their Kings, and say he was the son of Richimer. The Gesta Francorum and Prosper Tyro call their first King Faramond. The former pretends he was selected for that dignity by the advice of his father Marchomir. A third chronicle gives to his father the name of Sunno; and both Sunno and Marchomir are mentioned with Genebald as generals of the Franks, in an expedition they made across the Rhine in the time of Maximus[1]. All agree that the second King of the Franks was called Clodio; but with respect to the names, succession, and relationship of these princes, the greatest uncertainty prevails till we arrive at Childeric, the father of Clovis, who died in 481. It is even doubtful, whether the whole body of the confederates,

[1] Between 383 and 388.

united under the name of Franks, were originally the subjects of Clovis. Towards the end of his reign, we hear of petty Kings, his relations, who had separate principalities, and appear in the character of allies rather than of dependents. But, whatever was the condition of these princes, they were extinguished by Clovis, who contrived to destroy them by force or fraud, and to persuade their subjects to acknowledge his authority.

(E.)—Page 13.

The history of the vase at Soissons has been repeatedly told, and must be familiar to the greater part of my readers; but it illustrates too forcibly the limited authority of the early Kings of the Franks to be entirely omitted. Saint Remy having applied to Clovis for a vase of extraordinary magnitude and beauty, which his soldiers had carried off from the church at Rheims, the King of the Franks promised to restore it; and when his army met at Soissons to divide their plunder, he entreated them to give him that vase in addition to his proper share of the spoil. The army in general seemed disposed to acquiesce in his request, when a common soldier, striking the vase with his battle-axe, exclaimed, "You shall have nothing here but what you obtain fairly by lot." Clovis dissembled his resentment at the time; and though he afterwards took vengeance for the insult, it was by treachery, and on a false pretence, that with his own hand he killed the soldier [1].

[1] Gregor. Tur. l. 2. c. 27. Dom. Bouquet. ii. 175.

Other proofs are not wanting that Clovis had not power to restore the spoils taken by his soldiers without their consent. After his victory over the Visigoths, the bishops of Aquitaine applied to him for the release of the captives that had belonged to the church. The Franks, who had by this time become Christians, gave their consent; but in the answer of Clovis, he informs the bishops, that his people insist on their making oath to the truth of their allegations in every particular case they bring forward, as many false and fraudulent claims had been detected [1].

Nothing indeed is more clear, than that the Kings of the Franks were not possessed of that absolute authority, which the monarchical theory, in the mouths of their churchmen and lawyers, began at a very early period to ascribe to them. Gregory of Tours, in his history of the vase at Soissons, makes the army reply to their King in a strain better suited to Roman provincials than to high-minded and free-born Germans. "Glorious King," they are supposed to say, "let every thing we see before us "be thine; are not we ourselves subject to thy dominion? "Do what pleases thee best; there is none here to stand "against thee or resist thy will [2]." It is whimsical enough that within a few pages of this passage the historian is obliged to confess that after Clovis had become secretly

[1] Dom. Bouquet. iv. 54.

[2] Omnia, gloriose rex, quæ cernimus tua sint; sed ac nos ipsi tuo sumus dominio subjugati; nunc quod tibi bene placitum videtur, facito; nullus enim potestati tuæ resistere valet.

a convert to Christianity, he was afraid openly to renounce his idols because his subjects were still attached to their ancient worship; and it was not till assured of their conversion, that he ventured to receive the sacred rite of baptism [1]. This hesitation reminds us of Edwin, King of the Northumbrians, who was placed in the same situation, not daring to make public profession of Christianity till he had brought over his thegns and ealdormen to that persuasion [2].

Beside the national wars, in which the public was concerned, it had been customary for the Germans to engage in private expeditions for conquest or plunder, under chiefs whom they voluntarily followed. These expeditions were proposed in the general assembly of the tribe by some warrior of established reputation, who offered himself as leader of the enterprise. Those, who approved of the project, and had confidence in the leader, tendered their assistance. The multitude applauded their resolution, and if they failed in their engagement, they were regarded as traitors and deserters, and no faith was ever reposed in them afterwards [3]. The adventurers, who subdued Britain, were probably bands of this description; and after the establishment of royalty among the Franks, traces of this ancient custom were long preserved. It was by persuasion, and not by their authority as Kings, that Clovis

[1] Greg. Tur. l. 2. c. 31. [2] Bed. Hist. Eccl. ii. 13.
[3] Cæsar de Bell. Gall. vi. 23.

and his successors engaged their subjects in distant expeditions. To induce his warriors to attack the Visigoths, Clovis urged the scandal of permitting Arians to possess any part of Gaul; and it was to their new-born zeal as converts to the orthodox faith as much as to their passion for plunder, that he owed their concurrence in that expedition[1]. To excite his army to invade the Thuringians, Thierri collected them in a body and inflamed their resentment by his recital of the cruelties, which in a former age had been inflicted by that people on their countrymen[2]. Not only were Kings unable to lead their subjects where they pleased; but when the popular voice was raised in favour of any hostile enterprise, they were obliged, if they could not divert the current, to follow the course it prescribed to them. When Childebert and Clotaire had in vain solicited their brother Thierri to assist them in their invasion of Burgundy, his subjects exclaimed, that if he persisted in his refusal, they would renounce his service and follow his brothers; and it was only by promising them the spoils of Auvergne, that Thierri prevailed on them to change their purpose and accompany him into that province[3]. When Clotaire was inclined to accept the terms of peace offered him by the Saxons, his army mutinied, broke into his tent and threatened to murder him unless he went on with the war[4]. Even under the Carlovingian princes the advice

[1] Greg. Tur. ii. 37.
[2] Ibid. iii. 7.
[3] Ibid. iii. 11.
[4] Ibid. iv. 15.

of the army was often taken and its consent obtained before embarking in foreign wars[1]. On the other hand, when Pepin, father of Charlemagne, prepared an expedition against the Lombards, the chiefs with whom he consulted threatened to abandon him and return home, if he persisted in the enterprise[2].

The monarchical theory ascribes exclusively to the King all the executive functions of the government. Among us, from early times, it has been the practice of the King to consult with his subjects in matters of state and internal administration, as well as to obtain their consent for the enactment of laws and imposition of taxes. The same usage appears to have existed among the Franks under the two first races of their Kings. Many instances of it have been collected and published in an excellent work called Théorie des Loix politiques de France (tome 3me, Preuves 113. 115; tome 6me, Preuves 158. 165). Others are to be found in the Monarchie Française of Montlosier (i. 395, 396.) It is obviously a remnant of the ancient constitution of the German tribes.

(F.)—Page 16.

It is not surprising that the Kings of the Barbarians were intoxicated by the strains of adulation poured into their ears by their clergy. Some notion may be formed of the excess of this baseness from a speech of Gregory of Tours to Chilperic, which that historian has recorded of

[1] Dom. Bouquet. v. 35. 37. 45. 47.

[2] Eginhard, vita Karoli M. 36.

himself. "If any of us, O King! transgress the boundaries "of justice, thou art at hand to correct us; but if thou "shouldst exceed them, who is to reprehend thee? We "address thee, and if it please thee, thou listenest to us; "but if it please thee not, who is to condemn thee, save "Him, who has proclaimed himself justice[1]?" No wonder that Levesque, in commenting on this passage, should have stigmatised the nation, where such language was heard, as a people "abruti dans les fers."

In justice, however, to churchmen, it must be owned, that some of them held a different language. Hincmar, archbishop of Rheims, who lived under Ludovicus Pius and his sons, lays it down as a principle, that Kings are bound to observe the laws that had been made by their predecessors with consent of their subjects; and after stating it to be the opinion of some, that princes are subject to none but God, who placed them by hereditary descent where they are, he adds, that this is not the doctrine of a Catholic Christian, but of a blasphemous and diabolical spirit[2]. When Hincmar wrote, it is true, the bishops had already claimed and repeatedly exercised the right of deposing Kings for their misconduct.

(G.)—Page 16.

The resemblance between the monarchical theory of modern Europe and the principles of government esta-

[1] Gregor. Tur. l. 5, c. 19. Qui se pronuntiavit esse justitiam.

[2] Montlosier. Monarchie Française, i. 406.

blished in imperial Rome, has not escaped the observation of Blackstone[1]. After describing what he regards the peculiar advantages of monarchy in giving "unanimity, "strength, and despatch" to the administration of public affairs, without considering that, in practice, it is not the King alone, but the King with the advice and concurrence of his confidential servants, that conducts the government of England, he concludes with the following passage. "The King of England is therefore not only "the chief, but properly the sole, magistrate of the "nation; all others acting by commission from, and in "due subordination to, him: in like manner as, upon "the great revolution in the Roman states, all the powers "of the ancient magistracy of the commonwealth were "concentered in the new Emperor; so that, as Gravina "expresses it, in ejus unius persona veteris reipublicæ vis "atque majestas per cumulatas magistratuum potestates "exprimebatur." If Blackstone's subject had led him to investigate the origin of the monarchical theory, it is clear from this passage that he would have arrived at the conclusion expressed in the text.

Montlosier, in his very acute and ingenious, though prejudiced, work on the French monarchy, has proposed a similar theory with respect to the origin of the monarchical system in Europe. The celebrated maxim of the French lawyers, "qui veut le roi, si veut la loi," he refers to its proper source in the civil law, and contrasts

[1] Blackstone, i. 250.

it with the declaration of Charles the Bald, "lex fit "consensu populi et constitutione regis[1]." As an illustration of the ancient French law he cites the following passage from the Establishments of St. Lewis. "Bers si "a toutes justices en sa terre. Ne li roi ne püet mettre "ban en la terre au baron, sans son assentement, ni li "bers ne püet mettre ban en la terre au vavasor;" and sets in opposition to it the commentary of Beaumanoir, who as a lawyer was scandalised at such an admission on the part of the King, "Voire est que le roi est Souverain "pardessus tout, et a de son droit le général garde du "royaume, par quoi il peut faire tel établissement "comme il lui plaît pour le commun profit, et chi il "établit i doit être tenu[2]." In the words of St. Lewis we have the real King, limited, as he then was, by usage. In the commentary of Beaumanoir we have the ideal King, with the prerogatives ascribed to him by his lawyers.

The same author refers to the memoirs of Lewis XIV. for the impression made on Kings by the monarchical theories in which they are educated. Instructing his son, the expectant heir of his crown, in the rights and duties attached to his station, that monarch expresses himself as follows: "Vous devez donc premièrement "être persuadé, que les rois sont seigneurs absolus et "ont naturellement la possession pleine et libre de tous "les biens qui sont possedés, aussi bien par les gens

[1] Monarchie Française, i. 179. 310.

[2] Ibid. 308, 309. Etablissemens de Saint Louis, l. 1. ch. 24.

" de l'église que par les séculiers[1]." In other passages the King gravely assures his son, "que les rois sont nés " pour posséder tout et commander à tout[2]," and that they are " les arbitres souverains de la fortune et de la " conduite des hommes[3]." Adverting, as he frequently does, to their divine original, he boasts "que le ciel les " a fait depositaires souverains de la fortune publique[4];" and insisting on the wickedness of resisting their commands, he observes, " Celui qui a donné des rois aux " hommes a voulu qu'on les respectât comme ses lieu- " tenans; se réservant à lui seul le droit d'examiner leur " conduite. Sa volonté est que quiconque est né sujet, " obeisse sans discernement[5]." Our James I. was content to " adorn his person with some sparkles of divinity;" but, in what relates to the true discernment of character and to the judicious distribution of places and favours, Lewis XIV. claims for himself and brethren the omniscience as well as the authority of the Almighty. The pretension is so extraordinary that it deserves to be given in his own words. " Il en est sans doute de certaines " (fonctions de la royauté) où tenant, pour ainsi dire, la " place de Dieu, nous semblons être participans de sa " connaissance aussi bien que de son autorité; comme, par " exemple, en ce qui regarde le discernement des esprits, " le partage des emplois, et la distribution des grâces[6]."

[1] Memoires de Louis XIV., 1me Partie, 156.
[2] Ibid. 2de Partie. 10.
[3] Ibid. ibid. 57.
[4] Ibid. 1me Partie. 67. 75.
[5] Ibid. 2de Partie, 55.
[6] Ibid. ibid. 16, 17.

Extravagant as these doctrines must appear to an Englishman of the present day, let it be remembered that they were openly professed under the two first princes of the house of Stuart, applauded by their bishops, and inculcated by their chaplains and divines.

(H.)—Page 16.

Heretoga signifies the leader of an army, and is derived from *here*, army, and *teon*, to lead.

The modern word King is a contraction of the Anglo-Saxon *cyning*. Some have derived it from a verb that signifies to know, and to can or be able, Kings being wise and powerful. But a more probable etymology is suggested by Lye in his edition of Junius, viz. that *cyning* is derived from *cyn*, which means kindred, family, tribe, nation. In confirmation of this origin of the word it is to be observed, that in Mæsogothic, *thiuda* means people, and *thiudans*, king; that in Norway *fylkir* was the word used to denote a petty or provincial King, and *folc* to express the inhabitants of the district; that among the ancient Scandinavians *drottnar* was the title of their Kings, and *drott* their word for people. The Anglo-Saxons had also the word *drihten* for supreme lord, and *driht* for people, and sometimes they called their King *cynehlaford* or lord of the nation, distinguishing him thus from inferior *hlafords*, who were the lords of none but their immediate followers or companions.

But the word *cyning* in Anglo-Saxon, from its structure, is manifestly a patronymic; like *Æscing*, son

of *Æsc; Uffing*, son of Uffa; *Ælling*, son of Ælle; *Cerdicing*, son of Cerdic; *Iding*, son of Ida; *Cŷding*, son of Cryda; *Ætheling*, son of the *Æthel* or noble. According to this analogy the person, who had the title of *cŷning* given to him, was considered as one standing in the same relation to the tribe that a man does to his father or to the founder of his race. In other words, the *cŷning* was considered as the son or child of the nation, a more appropriate designation, perhaps, than the modern phrase of Father of his people.

(I.)—Page 41.

The word ætheling meant originally a person of noble birth, the child of an æthel or noble, and was used in that sense by the Lombards, Bavarians, Anglii, and Werini, and by the continental Saxons as late as the ninth century[1]. Among the Anglo-Saxons it seems to have been restricted to persons of royal descent, including, however, in that description the families of the petty Kings as well as of the chief Kings of the nation. Noble families are distinguished in the Kentish laws by the appellation of *eorlcund*, and the descendants of those who had raised themselves above the rank of ceorls were said to be of the *gesithcund* race, from the word *gesith*, which meant the companion of a chief[2].

[1] Paul. Diacon. l. 1. c. 21. Canciani, ii. 293. iii. 31. Nithard, l. 4. c. 2. apud Dom Bouquet. vii. 29.

[2] Wilkins's Leg. Anglo-Saxon, 7. 72.

(K.)—Page 42.

Neither in Bede, nor in Malmesbury or Westminster, who also relate the fact, is there any mention of the sum paid. Bede calls it debita multa, which implies it was the legal composition. The payment made by the Kentishmen for the slaughter of Mul is variously given in the different MSS. of the Saxon Chronicle. In two of the oldest and best (as I am assured by the learned editor of the new edition of that valuable work now printing under the auspices of government), it is described as the composition due for thirty men; in two others it is stated to have been 30,000, omitting the denomination of money in which it was estimated; and in one it is said to have been 30,000 pounds. Discarding the last as an obvious blunder, it becomes a question, whether the sum produced by the insertion of sceatta after 30,000, or that produced by the insertion of thrymsa will best agree with the composition for thirty men. Assuming these men to be twyhynd men, their united weregilds must have been 6,000 shillings or 30,000 pennies, which make 120½ pounds. Thirty thousand sceatta make exactly 120 pounds, or the simple weregild of a King by Mercian law; thirty thousand thrymsa make 375 pounds, or the entire weregild of a King by northern or middle Angle law; and, as the former agrees best with the composition for thirty men, it is probable that sceatta is the word omitted in the MSS., which ought to be restored.

(L.)—Page 44.

The changes that insensibly take place in the notions and sentiments of mankind, when viewed at long intervals of time, are not devoid of curiosity or unworthy of observation. The law of treason was originally founded on the allegiance, fealty or mutual connexion between a chief or lord and his men or companions, and when first introduced, it gave no greater protection to the King than to the meanest chief in his dominions. "Majesty," as N. Bacon remarks, "had not then arrived at its full "growth." So much are times altered, that a learned and distinguished judge, in his discourse on petty treason, has thought it necessary to inform his readers, that "in "the consideration of law there is a greater degree of "malignity in petit treason than in murder, arising from "that degree of allegiance, *however low*, which the "murderer owed to the deceased[1]." From this passage it appears, that the species of allegiance which gave rise to the law of treason is now esteemed so low, that something like an apology is made for taking it at all into consideration.

(M.)—Page 45.

The passage from Bracton referred to by Sir Edward Coke, relates to accidental homicide. After stating various cases where one person might cause the death of

[1] Foster, Crown Law, 327.

another without any felonious intent, and where he ought therefore to be acquitted, quia crimen non contrahitur nisi voluntas nocendi intercedit, and adducing infants and madmen as instances of persons incapable of committing crimes; Bracton proceeds to observe, in maleficiis autem spectatur voluntas, et non exitus—"for in crimes we are to consider the intention, and not the mere fact;" and then he goes on to state, et nihil interest, occidat quis, an causam mortis præbeat—"and it makes no difference whether the man commits the homicide himself, or supplies the means of effecting it."

The last words have misled Sir Edward Coke, who seems to have understood from them, that in the opinion of Bracton it made no difference whether the crime was actually perpetrated, or attempted by some overt act, though not accomplished. In Fleta[1], where the same passage is given in nearly the words of Bracton, the meaning is clear from a different collocation of the sentence. As corrected by his editor, the passage is as follows: In maleficiis autem spectari debet voluntas, et non exitus. Et nihil interest an occidat quis, an causam mortis præbeat; voluntas enim et propositum distinguit maleficia.

(N.)—Page 61.

Ammianus Marcellinus[2] relates of a King of the Alamanni, that, being reduced to straits and compelled to

[1] Foster, Crown Law, l. 1. c. 31. § 4. [2] Lib. 16. c. 12.

surrender at discretion, his companions, to the number of two hundred, with three of his intimate friends, voluntarily delivered themselves up as prisoners, thinking it disgraceful not to share his fortunes.

Another illustration of the attachment of companions to their chief, is afforded by a tragical story told in the early part of the Saxon Chronicle[1].

Cynewulf, King of the West Saxons, having gone with a small retinue to Merton, was beset in the house where he lodged by his enemies, and having imprudently sallied forth before his friends had assembled, he was slain on the spot. On his thegns coming up, the Ætheling Cyneheard, who had conducted the enterprise, offered to spare their lives and take them into his service; but they spurned at the proposal, and, attacking him, were all slain, except one, who was severely wounded. Next day a large body of the King's friends, roused by the news of his slaughter, arrived at the place with a determination to avenge his death. The Ætheling promised them lands and money, if they would assist in raising him to the throne, and reminded them that many of their kinsmen were on his side, who would not desert him. They replied, that no kinsman was dearer to them than their hlaford, and that they would never become the followers of his assassin; and turning to their kinsmen, who were with the Ætheling, they offered to let them depart in safety if they would abandon him; to which the others

[1] In 755.

replied, that the same offer had been made to the companions of the King and had been rejected by them, and for their part they cared as little for their lives as the companions of the King had done. A battle ensued, in which the Ætheling was slain with all his followers, except one who was godson to Ealdorman Osric, the commander of the opposite party.

In this narrative it is worthy of remark, that the companions of the Ætheling considered themselves bound to their hlaford by ties equally strong and sacred as those which subsisted between the companions of the King and their master. It was not as their King but as their hlaford that the latter refused to accept satisfaction for his death; and both parties in their turn attempted in vain to loosen the firmness and relax the sacredness of this connexion.

(O.)—Page 64.

This inference may be fairly drawn from the oath of a man to his hlaford, preserved in the Anglo-Saxon law[1]. The relation established by that oath is personal and conditional, without any reference to land as the bond of connexion between the parties; and with the substitution of the word hlaford for that of chief, it most probably expresses the mutual obligations between a German chief and his companions. An ancient law of the Visigoths declares, that if any one has given arms or other things

[1] Wilk. Leg. Anglo-Saxon, p. 63.

to a person under his protection (in patrocinio constitutus), it shall not be in his power to take back the gift. If the dependant wishes to change his patron, he is at liberty, says the law, to follow his inclination; for every freeman has an inherent right to attach himself (se commendare) to whom he pleases. But in that case he must give back to his patron all the gifts he had received from him[1]. If we substitute for patron the word chief, and for commendatus the word companion, we have probably in this enactment a vestige of the ancient customary law of the Germans. Other regulations follow, some of which show how much the Goths had already deviated from the primitive institutions of their ancestors. Among the Germans the companions fought for their chief; but among the Visigoths the dependant retained for himself half of the spoils he acquired in war, and resigned only half to his patron[2].

(P.)—Page 80.

As the proceedings in these cases afford a striking illustration of what was considered in those ages to be the relation of King and subject, I subjoin the speech of Trussell to Edward II., and an abstract of the proceedings against Richard.

The speech of Trussell, preserved by Knyghton[3], is as follows:

Jeo William Trussell procuratour dez prelatez,

[1] Leg. Visigoth, l. v. t. iii. § 1. [2] Ibid. l. v. t. iii. § 1. 3.

[3] Twysden, col. 2549.

contez, et barons, et altrez gentz en ma procuracye nomes eyant al ceo playne et suffisant pouare, lez homages et fealtez au vous Edward Roy d'Engleterre come al Roy avant ces œures de par les ditz personnes en ma procuracye nomes, rend et rebaylle sus a vous Edward, et deliver et face quitez les personnes avanditz en la meillour manere que ley et costome donnent. Et face protestacion en non de eaux qils ne voillent desormes estre in vostre fealte ne in vostre lyance, ne cleyment de vous come de Roy rien tenir. Encz vous tiegnent deshorse priveye persone sanz nule manere de reale dignite.

The same expressed or rather abridged in Latin is given as follows:

Ego Willielmus Trussell, vice omnium de terra Angliæ et totius parliamenti procurator, tibi Edwardo reddo homagium prius tibi factum, et extunc diffido te et privo omni potestate regia et dignitate, nequaquam tibi de cætero pariturus.

The proceedings against Richard are published at length in the rolls of Parliament. The following is an abstract of the most material parts.

Richard makes his abdication in the following manner: Ego Ricardus—omnes archiepiscopos, &c.—et ligeos homines meos quoscunque—a juramento fidelitatis et homagii, et aliis quibuscunque michi factis, omnique vinculo ligeantiæ ac regaliæ ac dominii quibus michi obligati fuerant vel sint, vel alias quomodo libet astricti, absolvo; et eos et eorum heredes et successores in perpetuum ab eisdem obligationibus et juramentis et aliis qui-

buscunque, relaxo, libero et quieto. He then enumerates all the royal dignities and prerogatives that do or may belong to him, all which, he says, renuntio, resigno, dimitto, et in eisdem cedo et ab eisdem recedo in perpetuum; and confessing himself insufficient and incapable to govern the kingdom, he subscribes this declaration.

The renunciation of Richard was read on the following day in Parliament, and unanimously and cordially accepted by the lords spiritual and temporal and people there assembled, or, as they are afterward called, by the states and people of the realm. It was thought proper, however, in justification of these proceedings, to exhibit articles of charge against the abdicated monarch, and to appoint procurators ad resignandum et reddendum dicto Regi Ricardo homagium et fidelitatem prius sibi facta.

The procurators appointed to this high office were two eminent lawyers, William Thirnyng and John Markham. Thirnyng had been created a puisne judge in the King's Bench in the 11th of Richard, and raised to the dignity of chief-justice in the 19th of the same prince. He was continued in that office during the reign of Henry IVth, and retained it at the accession of Henry Vth. Markham had been made a puisne judge in the King's Bench in the 20th of Richard, and remained in that situation under Henry IVth.

The speech made by Thirnyng to Richard was in the name "of all the states and all the people that was then "gadyrd by cause of the summons" to Parliament, who

have accepted, as he informs the King, his renunciation, and having " redd certain articles of defaute in his " governaunce, they have deposed him and adjugged him " to be deposed and pryved of the astate of Kyng and of " the lordeship contened in the renunciation and cession " forsayd, and of all the dignitie and wyreshipp and of " all the administration that longed ther to. And we " procurators," he adds, " of all thes states and poeple " forsayd, os we be charged by him and by hir autorite " gyffen us, and in hir name, zeld zowe uppe, for all the " states and poeple forsayd, homage, liege and feaute, and " all ligeance, and all other bondes, charges and services " that long ther to. And that non of all thes states and " poeple from this time forward ne bere zowe feyth ne do " zowe obeisance os to ther Kyng."

I have quoted these passages as specimens of the language as well as of the sentiments of our forefathers.

(Q.)—Page 82.

The Marquess of Mondejar, in his historical memoirs of Alonso the Wise[1], describes the singular right mentioned in the text as the general law of Spain; and speaking of the consequences that attend it, he says, esto es perder el derecho i privilegios, de que gozaban como naturales suyos, los que se valian del, quedando libres por su medio, para poder servir a quien quisiessen, sin nota de haver faltado a la obligacion del vassallage

[1] Lib. v. ch. 15.

debido a su señor natural. The same privilege is thus defined in the Partidas[1]: Desnaturar segunt lenguage de España tanto quiere dezir como salir home de la naturaleza que ha con su señor e con la tierra en que vive. The following are cases where this privilege might be lawfully exercised: Esto es fuero de Castiella, si el Rey desafuera algund rico ome, que se tiene por desaforado e se fuer de la tierra, suos vasallos e suos amigos deven ir con el e ayudarle, fasta que el Rey le rescive a derecho en sua corte. E si el Rey desafuera algund fijodalgo, si este que se tiene por desaforado, es vasallo de algund rico ome, si el Rey non quisier judgar fuero por sua corte, suo señor con este suo vasallo pueden espedirse del Rey, si quieren salir de la tierra, e buscar senor que les faga bien[2]. The rules to be observed by those who avail themselves of this right are given in the Fuero viejo, and, with some differences, in the Partidas. Many instances where it was exercised are to be found in the histories both of Arragon and Castille. Though prohibited by the Partidas, it was not uncommon for Spanish nobles to go over to the Moors.

(R.)—Page 93.

When Madox asserts[3], that "the whole justice of the "kingdom was primarily and originally the King's," he

[1] Partida iv. tit. 24. l. 5.

[2] Fuero viejo de Castilla, l. i. t. iv. l. 1.

[3] Exchequer, i. 86. 4to.

must be understood to speak of the ideal King of the law, and not of the real person who, in early times, bore the title of King in England. The fiction that all justice emanates from the King is, nevertheless, of great antiquity. It was completely established and adopted as a maxim of law in the time of Bracton. In treating of judicial procedure that author has the following remarks. Ideo videndum erit de iis quæ pertinent ad regnum; quis primo et principaliter possit et debeat judicare: et sciendum est quod ipse rex et non alius, si solus ad hoc sufficere possit, cum ad hoc per virtutem sacramenti teneatur astrictus [1]. He adds afterwards [2],—si ipse dominus rex ad singulas causas terminandas non sufficiat, ut levior sit illi labor, in plures personas, partito onere, eligere debet de regno viros sapientes, et ex illis constituere judiciarios. In the same spirit Britton commences his treatise on the law of England by putting these words in the mouth of Edward I.: Pour ceo que nous ne suffisons mye en nostre propre persone à oyer et terminer toutes quereles del people [3]; and Spelman adds his authority by saying, Omnis regni justitia solius Regis est [4]. "Le prince est la source de toute justice" was also a fundamental principle of the ancient law of France [5]. The same theory was adopted in Castille [6].

[1] L. iii. t. ii. c. 9. § 1. f. 107. [2] Ib. c. 10. § 1.
[3] F. 1. a. [4] Glossar. Cancellarius.
[5] Bouquet, Droit public de France. Avertissement.
[6] Marina, Ensayo, § 47.

(S.)—Page 94.

Mably[1] has no doubt of the existence of appeals under the two first dynasties in France: Robertson[2] appears to entertain the same opinion. Montesquieu[3] treats at length of appeals to the King's court for default of justice and of appeals of false judgment. Meyer[4] admits of both, but contends that appeals, in the sense of applications to a higher court for the revision and amendment of the decisions given by inferior tribunals, were unknown till the establishment of the feudal system. If the judges of an inferior court pronounced an illegal or iniquitous judgment, they might be cited before a higher tribunal, and the case was again subjected to examination. If found guilty, they were fined or otherwise punished for their fault; but the judgment they had given, he pretends, was not disturbed or affected by the disgrace or punishment they had incurred. Respect was still had to the original principle of northern jurisprudence, that every court is supreme as far as its jurisdiction extends. It was not till the introduction of the feudal gradations of authority, that appeals, in the sense of the civil law, could be carried from the court of an inferior lord to the court of his superior.

To the system maintained by this learned and ingenious author many objections present themselves. It

[1] Observ. sur l'Hist. de France, l. ii. ch. 5. note 6, and l. iii. ch. 2. note 2.

[2] Charles V., Introd., note 23.

[3] Espr. des Loix, l. xxviii. ch. 27, 28.

[4] Esprit des Inst. Judic. i. 452—465.

seems incredible, that, in any system of judicature, there should be no power to rectify a judgment, which had been declared illegal and unjust by a tribunal competent to entertain the question. That the judicial system of the Barbarians was not liable to this reproach appears from many passages of their laws; to some of which Meyer has himself referred, though he disputes the conclusions to be drawn from them.

A law of the Bavarians[1] declares in direct terms, that a judgment founded in error shall be null and void: Si— per errorem injuste judicaverit (judex), judicium ipsius, in quo errasse cognoscitur, non habeat firmitatem. In order to carry this law into effect, there must have been some court of revision or appeal to pronounce the first judgment erroneous.

A constitution of Clotaire I.[2] gives, in his own absence, to the bishops, a right of superintendence over the ordinary judges, with authority to make them review and amend their decisions when contrary to law and justice: Si judex aliquem contra legem injuste damnaverit, in nostri absentia per episcopum castigetur, ut quod perpere judicavit, versatim melius discussione habita emendare procuret.

In the prologue to the Burgundian law[3] it is expressly ordained, that a cause, which had been decided contrary to law, should be tried a second time: Si quis sane judi-

[1] L. Bajuv. t. ii. c. 19. [2] Baluz. i. 8.
[3] Canciani, iv. 13.

cum, tam Barbarus quam Romanus, per simplicitatem aut negligentiam præventus, forsitan non ea, quæ leges continent, judicavit, et a corruptione alienus est, xxx. solidos Romanos se noverit inlaturum, caussa denuo discussis partibus judicanda.

From the Capitularies[1] it appears, that, according to the ancient law, one, who had lost his cause in an inferior court, was compelled either to acquiesce in the sentence, or to lodge an appeal to the King's Court: De clamatoribus vel causidicis, qui nec judicium Scabiniorum adquiescere nec blasphemare volunt, antiqua consuetudo servetur; id est, ut in custodia reclaudantur donec unum e duobus faciant. Et si ad palatium pro hac re reclamaverint et litteras detulerint, non quidem eis credatur, nec tamen in carcere ponantur; sed cum custodia et cum ipsis litteris pariter ad palatium nostrum remittantur et ibi discutiantur sicut dignum est. Why was the party that appealed excused from acquiescing in the judgment of the inferior tribunal, unless the King's Court, to which he appealed, had the power, if it saw cause, to reverse the decision against him? That such a power was exercised habitually by the King's Court, appears from the account given by Hincmar of the palatine offices under Charlemagne. Describing the duties of the comes palatii, he mentions as one of the most important—ut omnes contentiones legales, quæ, alibi ortæ, propter æquitatis

[1] Capit. 2. in 805. § 8. Lothar. 1. leg. Lombard. 64.

judicium palatium aggrediebantur, juste determinaret, seu perverse judicata ad æquitatis tramitem reduceret[1].

These passages seem utterly irreconcileable with the conclusion of Meyer, that in the appeals known to the Barbarians, " si le juge est condamné pour avoir manqué " à son devoir, son arrêt n'en demeure pas moins inat- " taquable."

(T.)—Page 100.

As the passages referred to in the Year Books are curious and decisive, I shall insert them for the gratification of the reader.

Year B. 22 Edw. III. 3 b. Fuit dit—que en temps le Roy Henry et devant le Roy fuit emplede come serroit auten home de people: mez Ed. Roy son fitz ordeigñ que home sueroite vers Roy par peticion.

Year B. 24 Edw. III. 55 b. Wilbye, a judge, said, Jaye viewe jadis tiel brief p̃r Henry Regi Angliæ, &c. en lieu de que est ore don peticion pur son prerogative.

Year B. 43 Edw. III. 22. In an argument whether an advowson appendant to a manor passed from the crown with the grant of the manor, there being no words to that effect in the grant, Candishe says,—En temps le Roy H. le Roy ne fuit mes come c̃oe parson, car a ceo temps home averoit briefe dentre sur dissẽin vers le Roy et touts auters maners daceions come vers auter parson,

[1] Théorie des Loix Polit. de France, vii. Preuves, 166.

issint a ceo temps quant le Roy donc un mañ fees et avowsons passer par son doñ auxibien come passeř par auter doner.

The conclusion with respect to advowsons was contested; but no doubt was expressed of the allegation, that in the time of Henry III. the King might be sued like a private person. Judgment was given against the crown on the ground that before the statute De Prærogativa Regis, grants of the King were interpreted like those of common persons.

(U.)—Page 120.

The horror entertained by the ancient inhabitants of the North for the plunder or disturbance of the dead is strongly expressed in many of the laws of the Barbarians. To commit *walreaf*, that is, to strip a dead man, whether buried or not, of his arms or clothes, or of any thing about him, was stigmatized by the Anglo-Saxons as the act of a *nithing*, which was with them the most severe term of reproach; and if any one was appealed for so unworthy a proceeding, he was bound to clear himself by the oaths of forty-eight full-born thegns[1]. One who disinterred or plundered a dead body, after it was buried, is declared a *wargus* or vagabond by the Salic law, and excluded from all intercourse with mankind till he has received forgiveness from the relations of the deceased, and obtained their intercession for his pardon. If food or shelter was given to him while he remained in this

[1] Wilkins, Leg. Anglo-Saxon. p. 27. Bromton. col. 897.—H. 83.

state of outlawry, the person who supplied his wants, though his wife or nearest relation, was subjected to a heavy penalty[1].

This excessive abhorrence of violations of the sepulchre had most probably its origin in the ancient superstitions of the North. It was the belief of the Teutonic tribes, that the arms, dress, and ornaments, deposited with a warrior in his tomb, accompanied him to the hall of Odin, and served there for his use and decoration. It was their practice, therefore, to bury the dead in their best attire, and to place with them in the grave their arms, rings, bracelets, and other ornaments of gold and silver, with some coined money in case they should have occasion for it[2]. To purloin any part of this deposit was resented as a grievous and irreparable injury to the dead. To the worshippers of Odin it must have appeared the same calamity as to their posterity seemed the denial of the rites of Christian burial, or the suppression of the prayers and masses appointed for the souls of the deceased.

[1] Pact. Leg. Sal. Ant. t. xvii. § 2. 3. t. lviii. § 1. Reform. t. xvii. t. lvii. Similar, but less severe regulations against the spoliation of the dead are to be found in the laws of the Alamanni, t. l., and in those of the Bavarians, t. xviii. Among the Visigoths, if a freeman violated a sepulchre, and took from the dead body any of its ornaments or clothes, he received a hundred lashes, and had to pay a pound of gold; if a slave committed the same offence, he received two hundred lashes, and was burned alive. L. Visig. l. xi. t. ii. l. 1.

[2] Percy's Mallet, i. 344—346. Note of Eccard in Canciani, ii. 9.

(V.)—Page 139.

The different facts relating to the partition of land and chattels between the Barbarians and the Provincials, in whose territories they settled, have been collected by Savigny in his admirable work on the history of the Roman law in the middle ages. The following abstract of his researches may not be unacceptable to some readers.

Among the *Burgundians* the land was partitioned between the Romans and their Barbarian conquerors immediately after the settlement of the latter in the territory to which they gave their name. Of the houses, offices, and gardens, the Burgundian received the half; of the cultivated land two thirds; and of the bondmen one third. The woods remained common property. The free Burgundian, who arrived after the first division, received, without any of the bondmen, half of the cultivated lands; and the manumitted Burgundian had only one third. There was an actual division of the land; but the whole territory was not divided at once between the two nations. Every Burgundian claimant had an estate assigned to him, of which he was entitled to the portion given to him by the law. The Roman, on whom he was quartered, is sometimes called his *hospes*, and sometimes the Barbarian is called the *hospes* of the Roman; so that the relation between them was considered to be mutual and reciprocal. The share of the Burgundian was called his *sors;* and his right to it, *hospitalitas*. If any Burgundian accepted beneficiary lands from the

King, he had no *sors* or allotment at the expense of his Roman *hospes*. Where the *sors* or allotment of a Burgundian was exposed to sale, his Roman hospes was entitled to the first offer; but no Barbarian could part with his *sors* unless he had lands elsewhere[1].

Among the Visigoths also the Romans were deprived of two thirds of their lands. Both the Gothic and Roman allotment was called sors[2].

The Ostrogoths took one third only of the lands of the Romans; but they retained the land-tax of the empire for lands held by the Provincials, their own estates being exempt from it. The portion they took to themselves was called *sors barbarica*. Roman estates once divided were not subject to a second partition[3].

The Gothic monarchy in Italy having been subverted by the arms of Belisarius and Narses, the country fell a prey to the Lombards, a nation that had advanced with rapid strides from the interior of Germany into the heart of the empire, and had therefore acquired less of the habits and dispositions of civilised life than the tribes which had been long settled on the frontier. Instead of taking from their subjects one third of their lands, they made them contribute one third of its produce. The Roman proprietor retained his land, and had the expense and trouble of cultivating the whole; but one third of its produce he was compelled to give to the Lombard

[1] Savigny, i. 279—282. [2] Ibid. 283.
[3] Ibid. 316—319.

who was quartered on him as his guest. Individual Romans were put to death, and their estates confiscated; but the partition of produce was the general rule adopted by the Lombards on their conquest of Italy[1].

Neither in the histories nor in the laws of the Franks is there an allusion to any uniform mode of dividing among the conquerors the lands of the vanquished. But Romans continued to hold landed property, and the Roman system of taxation was maintained. Romans are distinguished in the Salic law as *convivæ Regis*, *possessores*, and *tributarii*. The convivæ Regis corresponded to the antrustions and leudes of the Barbarians; the *possessores* were landed proprietors whose estates were burthened with a land-tax; the *tributarii* were Provincials subject to a poll-tax[2].

(W.)—Page 140.

Muratori[3] adopts the definition of alodial property given by one of the old glossarists: Alodium dicitur hæreditas, quam vendere et donare possum, ut mea propria. Lands, says Bignon[4] in his notes on Marculfus, were divided into propria and fiscalia. Propria seu proprietates dicebantur, quæ nullius juri obnoxia erant, sed optimo maximo jure possidebantur, ideoque ad hæredes transibant. Fiscalia vero beneficia sive fisci vocabantur, quæ a rege ut plurimum, posteaque ab aliis, ita concede-

[1] Savigny, i. 377—387. [2] Ibid. 294.
[3] Ant. Med. Æv. Dissert. 11. [4] Baluz. ii. 862. Canciani, ii. 177.

bantur, ut certis legibus servitiisque obnoxia cum vita accipientis finirentur.

Alodial land was termed by the Barbarians *hæreditas* from its inheritable quality, and *proprietas* because it was held in absolute property[1]. It was called *terra aviatica* or *alode parentum*, when it came to a man from his ancestors; and *comparatum* or *conquisitum*, when it was acquired by purchase[2]. The terra *salica* is supposed by some to have been land possessed by inheritance, in opposition to land obtained by purchase; and by others, to have been the land assigned to individuals as their private property at the time of the Conquest[3]. In the ninth and tenth centuries land of inheritance was said to be alodial, though held of a lord or superior, and liable to him in rent and services[4].

Alodial lands that came by inheritance descended to males in preference to females. In some nations the exclusion was absolute and perpetual[5]; but it might be defeated by a father, who chose by deed to call his daughters to the whole or to an equal share of his in-

[1] Notes of Eccard on the Pact. Leg. Sal. Ant. t. lxii. Canciani, ii. 104. And Notes of Bignon on the Formulæ of Marculfus, ib. 185. 197.

[2] Ibid. Ibid. L. Ripuar. t. lvi. Marculf. Form. ii. § 4. 6, 7. 11, 12. App. 47. 49.

[3] Mably, Observ. sur l'Hist. de France, l. ii. c. 5. note 7. Guizot, Essais, 95.

[4] Baluz. ii. 144, 145. 147. It is in this sense the words alodium and aloarius are to be understood in Domesday.

[5] P. L. Sali. Ant. t. lxii. § 8. Reform. t. lxii. § 6. L. Ripuar. t. lvi. § 4.

heritance[1]. Among the Anglii and Werini the daughters succeeded to the landed property of their father, if he had no male heirs within the fifth degree; "tunc demum," says the law, "hæreditas ad fusum a lancea transeat[2]." The Saxons preferred the son and the son's son to the daughter, in the inheritance of landed property, but gave it to the daughter before the brother[3]. Among the Alamanni, if there was no son, the daughters succeeded to the paternal inheritance[4]; and the same rule was the general law of the Burgundians[5].

All freemen, when legally summoned, owed military service to the state[6]. Alodial proprietors were subject, like others, to that obligation. But, as they served at their own expense[7], it was found necessary, when kingdoms became extensive and military expeditions distant, to excuse from actual service those who were unable to defray the charge. Charlemagne fixed at three, four, or five mansi[8] the quantity of land that imposed on the

[1] Marculf. Form. ii. 10. 12. App. 47. 49.

[2] L. Angl. et Werin. t. 6. § 8. [3] L. Saxon. t. 7. § 1. 5. 8.

[4] L. Alaman. t. 57. [5] L. Burgund. t. 14. § 1.

[6] L. Ripuar. t. 65. § 1.

[7] Théorie des Loix polit. de la France, t. iii. Preuves, 68. 70.

[8] So called a manendo, from being the residence of a family. The division of lands into mansi seems to have been very general, if not universal, among the Franks. Many passages tend to show that the mansus consisted of a determinate quantity of land; but others are inconsistent with that supposition. See Théorie des Loix politiques de la France, t. ii. Preuves, 112—135.

proprietor the necessity of serving in person. Those who had less joined with others, who were in the same predicament, to furnish a soldier from the number of mansi required to supply one by law; and freemen who had no land were made to contribute in proportion to their personal estate[1]. Persons excused by their poverty from distant expeditions, were required to assist in the construction and repair of roads, bridges, and fortified places; and if the province where they resided was invaded, they were bound to take up arms in its defence[2]. Alodial proprietors and freemen in general were also obliged to provide lodging, entertainment, and means of conveyance for the missi regis, and ambassadors from foreign parts[3]; and on stated occasions they were expected to make free gifts to the King[4].

(X.)—Page 142.

Some authors have confounded the fisc or property of the public, with the private or patrimonial estate of the King. Muratori has carefully distinguished them. "Duplex bonorum genus regibus Italiæ fuit; alterum ad "fiscum, sive ad coronam, pertinens; alterum patrimoniale "sive dominicatum[5]." The same distinction is marked

[1] Capit. 807. § 2. Capit. Im. 812. § 1. repeated in Capit. 828. § 7.

[2] Capit. Carol. C. t. 36. § 27.

[3] Marculf. Form. i. § 11. L. Ripuar. t. 65. § 3. Capit. 819. § 16. Precept. Ludov. P. pro Hispanis, § 1.

[4] Théorie des Loix polit. de la France, viii. Preuves, 154—160.

[5] Muratori, Antiq. Med. Æv. Diss. 19.

with the greatest accuracy in the laws of the Visigoths. In that nation monarchy was not merely in form, but in practice, elective. From the first establishment of the Visigoths in Spain to the final extinction of their empire, there is but one instance of the crown passing in the direct line of descent from father to son for more than three generations. It became necessary, therefore, in justice to the families of those called to the throne, to keep distinct the property they possessed as individuals from the property they enjoyed in right of the crown. The regulations to that effect were numerous. Whatever any King of the Visigoths possessed by inheritance or acquired by gift or purchase, descended to his heirs; whatever belonged to the kingdom, went to his successor [1].

The fisc belonged to the public. In the Lombard and Frank kingdoms of Italy it meant the fund or treasure "tum ad palatii splendorem sustinendum, tum "ad tutelam regni, aut ad belli necessitates, aliave "publici regiminis munia opportunum [2]." From its destination to the public service it was called pars publica. By the Lombard law [3], if a man held land, which was proved to have been at one time de publico, and could not show that he had enjoyed the undisturbed possession of it for sixty years, he was bound either to produce a grant

[1] Leg. Visigoth. l. 2. t. 1. l. 6. See also Conc. Tolet. iv. § 75.; viii. decretum; xiii. § 4.; xvi. § viii.; xvii. § 7.

[2] Muratori, Ant. Med. Ævi, Diss. 17. [3] L. Liutprand. vi. 24.

of the land to himself or to his ancestors, or to give it back to the public. Land holden by a serf or farmer of the King was held to be land of the public [1]. A grant of Charlemagne in 774 describes land, which had belonged to the fisc, as the property of the public and of the palace; and a charter of 924 mentions, "curtem "quandam juris regni nostri, quæ semper nostræ regiæ "et publicæ parti pertinuit [2]." In 978, the Emperor Otho II. confirmed the Bishop of Cremona in the possession of certain duties "ad nostram olim publicam "pertinentes partem;" and in 1038, Conrad the Salic, in regulating the mutual obligations of lords and vassals, describes the latter as persons, "qui beneficium de nos-"tris publicis bonis aut de ecclesiarum prædiis—tenent [3]." To these authorities, collected by Muratori, may be added a precept of Dagobert I. of France, in which that monarch grants to the abbey of St. Denis all the duties and tolls arising from a fair he had established— "quicquam ad partem nostram vel fisco publico de ipso "mercado ex ipsa mercimonia exactare potuerit [4]." Lewis I. having improvidently given away many of the royal vills to his nobles, while he administered the government of Aquitaine under his father, Charlemagne sent two of his missi into that province, "præcipiens, ut "villæ, quæ eatenus usui servierant regio, obsequio "restituerentur publico [5]."

[1] L. Liutprand. vi. 24. [2] Muratori, Antiq. Med. Æv. Diss. 18.
[3] Ib. Canciani, i. 236.; v. 43. [4] D. Bouquet. iv. 627.
[5] Ib.

Mably and Guizot[1] regard the notion of public property set apart for the service of the state, as a refinement too great for Barbarians. These excellent authors forget that for ages before the Teutonic nations quitted their original settlements, the territory they possessed had been considered the common property of the tribe[2], and that the portions detached from it for the use of individuals, reverted after a limited time to the public. They forget also, that payments to the state were known to the Germanic nations in the time of Tacitus, and consequently that the notion of public property was familiar to them before their establishment in the empire. The lesson these Barbarians had to learn was not a knowledge of public or common property in land, but of private, patrimonial, inheritable estates. The conversion of land from public to private property has been, doubt-

[1] Mably Observ. sur l'Hist. de France, l. 1. ch. 3. note 4. Guizot, Essais sur l'Hist. de France, p. 123.

[2] This notion seems to have prevailed very generally, if not universally, in the infancy of nations. Vestiges of it are still to be found in the province of East Friesland (Edinb. Review, vol. xxxii.); and periodic allotments of land, founded on the same principles, continue to be made by the Afghauns, a singular race, who, in the heart of Asia, exhibit in their laws, character, and political institutions, a most striking similitude to the ancient Germans For an admirable description of this extraordinary people, the reader will do well to consult Elphinstone's Account of Caubul, the most valuable and instructive work, with the exception of Volney's, that has appeared on any oriental nation in modern times.

less, in its consequences, highly beneficial to the community; but, when first carried to a great extent, there is reason to believe it was equally unpopular with the division of commons in modern times. The appropriation in perpetuity to private persons and their heirs, of lands that had formerly belonged to the community, and of which every one in his turn might hope to obtain at least temporary possession, seemed an encroachment on the ancient rights of the public. To protect and preserve from destruction the landmarks that served to distinguish the boundaries of private estates, laws and penalties were found necessary [1]. Rights of common were retained; and among the Visigoths in Spain large tracts were set aside for pasturage, under the name of *campi vacantes*, which no one had a right to enclose or appropriate [2]. Such was the deference for ancient usage, and so strong the recollection of common property in land, that in many parts of Europe the cultivated fields were every where open to the public from the separation of the crop to the ensuing seedtime. In France this was called the *temps de banon* [3].

An estate belonging to the Fisc or public was called a fisc; and the persons who cultivated and paid rent for it, whether serfs or freemen, were called Fiscalini [4].

[1] L. Langobard. Rotharis. 240. L. Visigoth. l. 10. t. 3. l. 1, 2. L. Bajuv. t. 11. c. 1. § 1, 2. L. Burgund. t. 55. § 4.

[2] L. Visigoth. l. 8. t. 3. l. 9.; t. 4. l. 26.

[3] Ib. l. 8. t. 3. l. 12. with Canciani's note. Hickes Gram. Anglo-Saxon. 163.

[4] Spelman, Glossary.

Estates that lapsed for want of heirs [1], and lands forfeited for delinquencies [2], escheated to the Fisc; that is, they reverted to the state from which they had been derived. Penalties for transgressions [3], and part of the dues for the administration of justice [4], were also payable to the Fisc. As the Fisc was administered by the King and his officers, its estates are often called the King's fiscs, their cultivators the Kings fiscalini, and the dues belonging to it were said to be paid ad partem regis [5].

Besides escheats for want of heirs, forfeitures for transgressions and other casualties authorised by law, the fisc was often enriched by illegal confiscations. Many instances of this injustice are to be found in the writings of Gregory of Tours and other historians. One deserves to be mentioned, because it describes in language not to be mistaken, the original and primitive notion of the fisc as being property that belonged to the public. Childebert II. had one Magnovald assassinated in his palace at

[1] Edict. Theodoric. reg. § 24. L. Salic. ref. t. 63. L. Ripuar. t. 57. § 4. t. 61. L. Alaman. t. 25.; t. 40. L. Bajuv. t. 14. c. 9. § 4.

[2] P. Leg. Sal. ant. t. 59. Reform. t. 59. L. Ripuar. t. 69. § 1, 2. L. Bajuv. t. 2. c. 1. § 1; c. 2. Leg. Langobard. Carol. M. § 5. Capit. l. 4. § 24.; l. 5. § 383.; l. 6. § 431.

[3] P. L. Salic. Ant. t. 65. Reform. t. 63 and t. 65. Capit. Part. Saxon. § 16. L. Bajuv. t. 2. c. 4. § 1.; t. 6. c. 6, 7. L. Alaman. t. 4.

[4] L. Ripuar. t. 89. Marculf. l. § 20. Capit. l. 4. § 56. L. Alaman. t. 1. § 2.; t. 3. § 3.; t. 31. § 1.

[5] Capit. l. 3. § 82. Leg. Langob. Carol. M. 5. Capit. l. 3. § 16. L. Frision. t. 3. § 2. 3. 8.; t. 17. § 4, 5. Capit. l. 3. § 30.; l. 4. § 5.

Metæ, resque ejus protinus direptæ et ærario publico, quantum repertum est, sunt illatæ[1].

Grants of fiscal lands to the church were innumerable. They began with the conversion of Clovis, and continued to the extinction of the Carlovingian dynasty. "Our "fisc," exclaimed Chilperic II. "is reduced to beggary; "our riches have been transferred to the church; the "clergy alone have power; the splendour of the crown "has vanished and gone to decorate the mitre of the "bishop[2]." The spoliation of the church by violence was the natural result of the exorbitant wealth it had acquired. Unable to recompense his soldiers for their services against the Saracens, Charles Martel quartered them on his clergy. A compromise was afterwards effected by his successors, which restored part of its possessions to the church, and established tithes over christendom.

The conversion of fiscal into alodial property is coeval with the first establishment of the Barbarians in the empire. An alodial estate was in strictness nothing but a portion of the national territory assigned in perpetuity to an individual and his heirs. The Burgundian law[3], in appointing to fresh adventurers a smaller portion of land than had been given to the original conquerors, plainly indicates, that the whole territory had not been

[1] Greg. Tur. L. 8. c. 36. as quoted by Guizot, Essais, p. 125.
[2] Guizot, 115. Greg. Tur. L. 6. c. 46. [3] Additam. 2m. § 11.

exhausted by the first partition, and that the lands which remained undivided were still at the disposal of the state. A formula is to be found in Marculfus[1] for the grant of fiscal lands in perpetuity, which were thereby changed into alodial possessions. Some authors have considered this formula of Marculfus as a precedent for the grant of an hereditary benefice. But it is only necessary to read with attention the act itself, to perceive, that what it creates is not an hereditary benefice, but an alodial estate. It is viewed in this light by Bignon in his notes on a subsequent formula[2], confirmatory of what had been done under the preceding one; and it is only from inadvertence that it could have been considered in a different point of view. It contains the legal form required for the grant of a vill with its appurtenances, "sicut a fisco "nostro possidetur—viro inlustri—in integra emunitate[3] "—perpetualiter—ita ut eam jure proprietario—habeat, "teneat atque possideat, et suis posteris—aut cui voluerit "ad possidendum relinquat, vel quicquid exinde facere "voluerit." There can be no doubt that this is the grant of an estate in absolute property. The formula that immediately follows, contains the precedent for a similar donation to the church in nearly the same words.

The earliest instance I have found of the transmutation of fiscal into alodial property occurs in a diploma of Charles Martel[4], executed in 726. After a description

[1] Lib. i. § 14. [2] Ibid. § 17.

[3] i. e. with exemption from foreign jurisdiction.

[4] D. Bouquet. iv. 705. No. 121.

of the property, the deed proceeds to say, "rex Hildebertus " genitori nostro Pippino de suo fisco—concessit—et mihi " —Pippinus jure hæreditario concessit." In the time of Charlemagne the fraudulent conversion of fiscal lands into alodial estates by the Counts and by holders of benefices, made it necessary to frame a law against a practice so injurious to the public. "Auditum habemus," says Charlemagne, "qualiter et comites et alii homines qui nostra " beneficia habere videntur; comparant sibi proprietates " de ipso nostro beneficio. Audivimus," he proceeds to state, " quod alibi reddant beneficium nostrum ad alios " homines in proprietatem, et in ipso placito dato pretio " comparant ipsas res iterum sibi in alodum. Quod om- " nino cavendum est, quia qui hoc faciunt, non bene cus- " todiunt fidem quam nobis promissam habent. Et ne " forte in aliqua infidelitate inveniantur, quia qui hoc " faciunt, per eorum voluntatem ad aures nostras talia " opera illorum non perveniunt [1]."

It appears from this capitulary, that the lands of the fisc could be converted into alodial property in the placita or courts held by the count; but that the count was responsible for the act, and in the instances which gave occasion to the law, that he had concealed from the government what he had done, from a consciousness that he had conducted himself fraudulently and to the prejudice of the state.

The conversion of fiscal into alodial property was

[1] Capit. 5m. a. 806. § 7, 8. Baluz. i. 453.

checked, but not abolished, by this enactment. A charter of Lewis III., in 901, grants to one Herrad a vill "perti- "nentem hactenus de fisco imperiali," with power "do- "nandi, ordinandi, commutandi, vendendi, sive quovis "titulo inscriptionis alienandi, remota totius publicæ "potestatis inquietudine[1]."

Part of the fiscal lands was appropriated to defray the maintenance of the royal household and expenses of the government. Part was given under the name of benefices to the Antrustions, Leudes, or vassals of the King, as a reward for their past and security for their future services to the state. This distinction is accurately made in the Capitula, drawn up by the bishops of France in a synod held at Epernay in 846, and presented to Charles the Bald and his nobles. "Videtur nobis," say these prelates, "utile et necessarium ut fideles et strenuos "missos ex utroque ordine per singulos comitatus regni "vestri mittatis, qui omnia diligenter inbrevient quæ tem- "pore avi ac patris vestri vel in regio specialiter servitio "vel in vassallorum dominicorum beneficiis fuerunt, et "quid vel qualiter aut quantum exinde quisque modo re- "tineat, et secundum veritatem renuntietur vobis." They go on to propose, that all reasonable grants should remain untouched, but that those which appeared to have been fraudulently obtained, or irrationally made, should be corrected "consilio fidelium vestrorum," to the end that your household may be upheld, your servants recom-

[1] Muratori, Ant. Med. Ævi, Diss. 19.

pensed, "et sic demum res publica vestra de suo suffragetur "sibi[1]." The proposition of the bishops was rejected by the nobles; but it establishes the fact, that there were two classes of fiscal lands, one employed in benefices, the other applied to defray the expenses of the government. Montesquieu[2] says the latter were termed *regalia*, but I can find no authority for the word in that acceptation. In the time of Charlemagne they are sometimes called fiscs simply, in contradistinction to benefices, as in the following capitulary: "Ut non solum beneficia abbatis— "vassallorum nostrorum, sed etiam nostri fisci describan- "tur, ut scire possimus quantum etiam de nostra in unius "cujusque legatione habeamus[3]." At other times they are called "villæ nostræ, quas ad opus nostrum serviendum "institutas habemus," and directions are given for their administration, such as a great proprietor might be supposed to issue for the management of his estate[4].

"Les biens réservés pour les leudes," says Montesquieu[5], "furent appellés des biens fiscaux, des bénéfices, des "honneurs, des fiefs dans les divers auteurs et dans les "divers temps." On this point it is unnecessary to enlarge, as there is but one opinion respecting it. But the case is different with regard to the length of time for which benefices were originally granted. Montesquieu, Mably,

[1] Capit. Carol. Calv. T. 7. § 20. Baluz. ii. 31.
[2] Espr. des Lois, L. 30. ch. 16.
[3] Capit. 3m. a. 812. § 7.
[4] Capitul. de Villis. Baluz. i. 331—342.
[5] Espr. des Lois, L. 30. ch. 16.

and Robertson, with most of the writers on the feudal law, agree in the conclusion, that benefices were at first revocable at the pleasure of the grantor. Muratori maintains the contrary. "Prima notio veterum beneficio-"rum," says that learned antiquary, "hæc fuit, videlicet "jus in acquirentem translatum perfruendi prædia tradita, "dum vita comes esset[1]." Bouquet also controverts the doctrine of the feudists, that benefices could be resumed at pleasure, or were ever granted for a single year. "Les capitulaires, qui défendent d'ôter un bénéfice sans une cause légitime, sont absolument contraires à cette opinion[2]." Hallam and Guizot have taken the same view of the question, and from the facts and arguments which they have adduced, no doubt can remain, that from their commencement, benefices were granted for life, subject to forfeiture for misconduct, and, from the violence of the times, liable, like every other species of property, to illegal confiscation[3].

Benefices were granted by alodial proprietors as well as by the fisc. It is probable, that this practice was resorted to whenever the estate of an alodial proprietor was larger than the maintenance of his household and private establishment required. The King, as possessor of a great alodial property, must also have granted benefices from his patrimonial estate. But in the kingdoms, where royalty ceased in practice to be elective,

[1] Muratori, Ant. Med. Ævi, Diss. 11.

[2] Bouquet. Le Droit public de France, 240.

[3] Hallam, Middle Ages, i. 160—163. 8vo. Guizot, Essais sur l'Hist. de France, 129—133. 139—141.

the private estate of the King came to be confounded with the fisc or property of the public, of which he was the principal administrator, and, as representative of the state, the nominal distributor. The original difference, however, between these two species of property was not entirely forgotten. So late as the reign of Lewis I. we find on one occasion a distinction made between the benefices of the King and those of the kingdom. If any one, says that prince, who holds honores nostros, shall neglect or refuse to entertain ambassadors coming to us, or to furnish them with the means of conveyance, "nec "nostrum nec regni nostri honorem ulteriùs volumus ut "habeat[1]."

From the first establishment of the Burgundians in Gaul royal grants among that people appear to have been hereditary; but those who held them were excluded from the allotments of alodial property, distributed to other freemen[2]. The cause of this singularity has not been explained. In Spain benefices of the crown were declared hereditary before the middle of the seventh century[3]; and those of private individuals could not be resumed on the death of the person to whom they had been given, if his son was willing to continue in the service of the grantor[4]. Among the Franks hereditary

[1] Capitul. 823, § 16. Baluz. i. 637.

[2] L. Burgund. t. 1. § 3, 4. T. 54. § 1.

[3] Conc. Tolet. v. in 636. § 6. Conc. Tolet. vi. in 638. § 14. Leg. Visigoth. l. 5. t. 2. l. 2.

[4] Leg. Visigoth. l. 5. t. 3. l. 1. 4.

benefices were slowly and gradually introduced. It seems generally admitted, that the benefices of the Merovingian Kings were made hereditary by the treaty of Andely in 587, confirmed by the edict of Clotaire II. in 615[1]. Benefices for life continued, however, to be granted by Charlemagne and his successors, and by whatever means it was brought about, there is reason to believe, that under the first princes of the Carlovingian dynasty, the greater number of benefices were of that description. Under Lewis I. hereditary grants became frequent, and a capitulary of Charles the Bald in 877, had the effect of converting all benefices into hereditary possessions[2].

One who held a benefice might grant any part of it to a third person to hold of himself, and by this practice, when it became general, a gradation of beneficiaries was every where established, from the first grantor to the actual occupant of the land.

The holders of beneficiary lands were bound, like alodial proprietors, to render military service to the state, and the neglect or refusal of this duty subjected the beneficiary to the forfeiture of his benefice[3]. Whether they held of the fisc, of the church, or of private persons, their obligation of military service was the same[4]. Some persons were excused from this duty, but the number

[1] Mably, Observ. l. 1. ch. 4, note 3 and 5. Guizot, Essais, 142.

[2] Mably, Obs. l. 1. ch. 3, note 2. L. 2. ch. 5, note 3. Guizot, Essais, 140—145.

[3] Capit. 807. § 1. Capit. 2m. 812. § 5.

[4] Capit. 1m. 812. § 5. Capit. 2m. 812. § 7. Capit. 5m. 819. § 27.

was not great; and if any others attempted fraudulently to elude its performance, they were fined [1]. Those who held lands of the fisc were compelled, under the penalty of losing their benefices, to entertain the missi regis and ambassadors going to court, and to convey them forward on their journey [2]. So far beneficiaries had the same obligations to discharge as alodial proprietors; but, in addition to these duties, they were bound to be true and faithful to the person from whom they held their benefice; to assist him in his private wars [3]; to attend his court; and to render him various services, personal and domestic. These duties, borrowed from the ancient relations of chief and companion, were at first vaguely and loosely defined; but as benefices were converted into hereditary possessions, they became more fixed, precise, and determinate. In return for these services and duties, the lord was bound to maintain his beneficiary or vassal, as he was called, in the land he had given him, and to protect and defend him with all his power. According to the fundamental principle of the connexion between lord and vassal, their obligations were mutual and reciprocal. "Quantum homo," says Glanville [4], "debet domino ex "homagio, tantum debet illi dominus ex dominio, præter "solam reverentiam."

The protection and security which a beneficiary or vassal derived from his connexion with a powerful

[1] Capit. 1m. 812. § 4. 9. Capit. 2m. 812. § 9. Capit. 5m. 819. § 27.
[2] Capit. 823. § 16. [3] Capit. 2m. 813. § 20.
[4] Glanville, l. 9. c. 4.

superior, led to a practice that seems at first sight unaccountable. It was the custom of alodial proprietors, from a very early period [1], to surrender their estate to the King, or church, or to some one able to defend them, on condition of receiving it back again as an hereditary benefice [2]. Benefices of this description were called *fiefs de reprise*, and by some they are supposed to have been more numerous than the fiefs or benefices created by real grants [3].

Precariæ and prestariæ were grants of land from the church, with some rent or service, in general, annexed to them. They might be conferred for life or for a term of years. The reversion was in the church; but the holders often succeeded in converting them into hereditary possessions, and the church was often defrauded of the rent and services reserved in the deed of gift. In some instances they were real grants. In other cases they were fiefs de reprise, the proprietor having surrendered his estate to the church, with the reservation of a life estate to himself or to some other person. They were sometimes held of laymen [4].

The same person often possessed both alodial and beneficiary property. That, which was alodial, he could

[1] Marculf. i. § 13. [2] Espr. des Loiz, l. 31. ch. 8.

[3] Montlosier, Monarchie Française, l. 72. 332.

[4] Guizot, Essais, 133—139. Marculf. Form. ii. § 5, 6. 40, 41. Append. 27, 28. 41, 42. Sirmond. Form. 7. Bignon. Form. 20. L. Alaman. t. 2. § 1.

dispose of at his pleasure. That, which was beneficiary, reverted to the donor on the expiration of the term for which it had been granted [1].

(Y.)—Page 143.

Somner takes the following description of bocland from an old leiger-book in Guildhall—"terra, quam homo "potest in lecto suo languens legare [2]." But this description applies to one species of bocland only, viz. to an estate in fee-simple. In the old Latin version of the Anglo-Saxon laws, published by Bramton, the word bocland is rendered terra hæreditaria in Alf. 3. and in Cn. P. 75—hæreditas in Cn. E. 11—terra testamentalis in Jud. Civ. Lund. and in Cn. P. 12—terra libera in Ethelr. 2—feodum in Edg. E. 2—and in the Textus Roffensis it is repeatedly translated alodium. It occurs sometimes, though rarely, after the Conquest. In a deed subsequent to that period it is described by the proprietor as land "de qua nulli respondeo [3]." It is found once only in Domesday in the sense of tenure. Certain lands are said to have been held in bocland in the time of King Edward [4]. The word alodium, when it occurs in that work, appears to be used in the sense of hereditary property.

[1] Bouquet, Droit public de France, 387. Robertson's Charles V., note 8.

[2] Somner's Gavelkynd, 83. [3] Ibid. 121.

[4] 1 Domesday, f. 11 b.

(Z.)—Page 154.

Among the Scandinavians *lân* was a military feud, and the persons who held such feuds were called *lænsmen* or *lændirmen*. "Observandum est," says Ihre, "feuda "alia apud nos *i len* concessa fuisse, alia *at veitslu*. Priora "qui tenebant, certum militum numerum in aciem edu- "cere debebant; posteriora vero habentes, commeatum "præbebent, aut definito cœnarum numero principem "cum comitatu cibare tenebantur [1]." In a passage of the Heimskringla, to which he refers, it is said of Halogaland, a province of Norway, that it had been held by Harek, suma at veitzlo enn suma at leni—"partim data sumtibus "ad convivia ferendis, partim feudo [2]." I have found no traces of this use of the word læn among the Anglo-Saxons.

(AA.)—Page 159.

Reveland is distinguished in Domesday from villein land and thegn land, and a comparison of different entries leads to the conclusion, that it was land attached to the office of gerefa. When land was fraudulently converted from thegn land into reveland, it was subtracted from the military service of the state, and appropriated by its civil servants, the gerefan, to the increase of their own salaries

[1] Glossar. Suio-Goth. *lân*, *weitsla*.

[2] Heimskringla, ii. 200. Edition of 1778.

or stipends. Complaints of this abuse are made in Domesday [1].

Thegn land was distinguished from ferm land, demesne land, and villein land [2]. If a doubt was entertained whether certain lands were thegn land or not, the question was tried and decided in a court of law [3]. But these different species of property might be exchanged [4]; and in some cases the one appears to have been arbitrarily converted into the other [5].

Land held for rent is mentioned at a very early period in the Anglo-Saxon laws. The rent was discharged partly by payments in kind, and partly by the performance of servile offices [6]. By a law of the Conqueror nothing more could be exacted from the cultivators of the soil than the rent due for their land, and while they were able to do their lawful service, they could not be expelled from their farms [7]. The services due from land were distinguished in later times into free or noble, and base or villein; but, in Saxon times, the distinction was unknown or little regarded. The country between the Ribble and the Mersey was held under the Confessor by a multitude of thegns, who were bound to

[1] 1 Domesday, 57 b, 69 a, 179 b, 181 a 2.

[2] Ibid. 64 b 2, 76, 86 a, 90 b, 98 b, 162 b.

[3] Ibid. 98 b bis, 181, 262 b 2. Spelman, Glossary, *Teinland*.

[4] Ibid. 64 b 2.

[5] Ibid. 67 a ter, 67 a 2 bis, 67 b 1, 76.

[6] In. 6. 23. 44. 59. 67. 70. [7] Gulielm. 33.

work like villeins in the reparation of the King's vills, to assist in his fisheries, to keep in order the hedges and hunting stations in his forests, and in harvest to send their reapers to cut down his corn. Yet these men are called liberi homines, and as such gave their attendance at the hundred and county courts, paid relief for their lands, and might quit them when they pleased on the payment of a fine[1]. Many tenants of the see of Worcester were in like manner bound to the performance of base as well as of free services[2].

[1] 1 Domesday, 269 b. [2] Heming, 292.

THE END.

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